

ALAI 2011 – Dublin Congress (16-17 June 2011)

Questionnaire – Boundaries and Interfaces

Answers Provided by BLACA in relation to the Situation in the United Kingdom

1. The subject Matter of Protection – Works

1.1 How do your legislators or caselaw define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

The 1988 Act characterizes literary works as ‘*any work, other than a dramatic or musical work, which is written, spoken or sung*’.¹ This category should not be restricted to works of literature. As Peterson J put it, this category contains every ‘*work which is expressed in print or writing, irrespective of the question whether the quality or style is high*’.² Speech is therefore protected as a literary work, but it is important to note that copyright will only come into existence once there is fixation in a form that has some degree of permanency, irrespective of who provides the fixation.

The case law supplements high-quality works with all kinds of compilations and tables.³ Trade catalogues,⁴ street directories,⁵ timetable indexes,⁶ examination papers,⁷ football fixtures lists,⁸ a listing of programmes to be broadcast,⁹ a racing information service,¹⁰ business letters,¹¹ and consignment notes¹² have all been held to be literary works protected by copyright. Lyrics for songs and computer programs are also protected.

An exception is presented by compilations of (only) artistic works. Compilations are protected as literary works, but only if they are written. Most artistic works are not written and such compilations of artistic works will therefore not attract copyright protection.¹³ The addition of a substantial quantity of written work will solve this problem, because the originality requirement will be met in these cases.

¹ CDPA 1988, s. 3(1).

² *University of London Press Ltd v. University Tutorial Press* [1916] 2 Ch 601 at 608.

³ See also CDPA 1988, s. 3(1)(a).

⁴ *Collis v. Cater* (1898) 78 LT 613; *Purefoy Engineering Co. Ltd v. Sykes Boxall* (1955) 72 RPC 89.

⁵ *Kelly v. Morris* (1866) LR 1 Eq 697.

⁶ *Blacklock (H) & Co. Ltd v. Pearson* [1915] 2 Ch 376.

⁷ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

⁸ *Football League v. Littlewoods* [1959] Ch 637, [1959] 2 All ER 546; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273.

⁹ *Independent Television Publications v. Time Out Ltd* [1984] FSR 64; a subsequent competition law initiative made the copyright owners grant licences and made the listings available to other publishers.

¹⁰ *Portway Press v. Hague* [1957] RPC 426.

¹¹ *British Oxygen Co. Ltd v. Liquid Air Ltd* [1925] Ch 383.

¹² *Van Oppen & Co. Ltd v. Van Oppen* (1903) 20 RPC 617.

¹³ A. Monotti, ‘The extent of copyright protection for compilations of artistic works’ [1993] 5 EIPR 156 at 160–1.

A literary work based on existing sources can be seen as a different expression of the same idea if no substantial amount of copying is involved, and if skill and labour has been invested in the new work. Because the idea is not protected, no infringement problem arises and the new work can attract copyright protection as a literary work. Translations,¹⁴ compilations,¹⁵ selection and abridgment,¹⁶ critical annotation and explanation,¹⁷ and editorial work that involves amendments¹⁸ all come under the head of literary works and qualify for protection irrespective whether the material taken from existing sources is in, or out, of copyright. As for all literary works, the *de minimis* principle applies. On this basis, copyright protection for the times of local trains, extracted from a general timetable,¹⁹ and for a collection of existing tables made for the front of a pocket diary²⁰ was refused.

It may, at first, seem contradictory, but certain similar works do not fall foul of the *de minimis* rule. These works involve a sufficient amount of skill and labour in the selection and use of the existing elements on the basis of a commercial judgment. Skill and labour are not restricted to literary selection, expression, and presentation, as became clear in *Ladbroke v. William Hill*.²¹ Copyright protection was granted to a fixed-odds football pool that consisted of a compilation of 16 known forms of bet, when the commercial judgment and skill used in the selection of these forms of bet was taken into account and reference was not solely made to the presentation on the pool form.²²

Works that derive, in some way, from an earlier source—such as a selection of poetry or a selection of letters written by a celebrity—attract copyright if more than a minimal amount of skill and labour is invested in the choice and presentation of the material.²³ The poems or letters that are reproduced by a substantial amount may still attract copyright, which will coexist with the copyright in the new work. It is obvious that the permission of all owners of a copyright is required to reproduce their work or to deal with the copyright in any other way; each copyright creates an independent exclusive right in this respect. All of this follows logically from the restrictive definition that is given to the originality requirement.

¹⁴ *Byrne v. Statist Co.* [1914] 1 KB 622; *Cummins v. Bond* [1927] 1 Ch 167.

¹⁵ *Portway Press v. Hague* [1957] RPC 426; *Football League v. Littlewoods* [1959] Ch 637, [1959] 2 All ER 546; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273.

¹⁶ *Macmillan v. Cooper* (1923) 93 LJPC 113; condensation of a single text may not be sufficient, but collecting an anthology of verse is likely to be sufficient: *Sweet v. Benning* (1855) 16 CB 459.

¹⁷ The notes appended to a condensed text showed sufficient literary skill, taste, and judgment in *Macmillan v. Cooper* (1923) 93 LJPC 113.

¹⁸ *Warwick Film Productions Ltd v. Eisinger* [1969] 1 Ch 508, [1967] 3 All ER 367 was concerned with an edited version of a trial transcript.

¹⁹ *Leslie v. Young* [1894] AC 335; see also *Blacklock v. Pearson* [1915] 2 Ch 376.

²⁰ *Cramp v. Smythson* [1944] AC 329; see also *Rose v. Information Services* [1987] FSR 254.

²¹ [1964] 1 All ER 465, [1964] 1 WLR 273.

²² For another example that attracted copyright (a random choice game in a newspaper with grids of letters printed on cards as the only literary material), see *Express Newspapers v. Liverpool Daily Post* [1985] 3 All ER 680, [1985] 1 WLR 1089; see also *Mirror Newspapers Ltd v. Queensland Newspapers Pty* [1982] Qd R 305; *Kalamazoo (Aust) Pty Ltd v. Compact Business Systems Pty Ltd* (1985) 5 IPR 213.

²³ See the comparison in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273.

Works can also derive from an earlier source in another way. Many literary works go through many drafts before they are eventually published: each one of these (unpublished) drafts will attract its own copyright as a literary work, as long as a minimum amount of skill and labour has been invested in adapting the previous draft. Correcting obvious incorrect typing errors will not suffice for that purpose, but any alterations to the work itself almost inevitably will.²⁴

At a more fundamental level, one needs to identify what exactly one is looking for as a work. In a book, each chapter, page, or maybe even each sentence can be said to amount to a (separate) literary work, but when each of them is incorporated into a larger work—that is, the book—one looks at the larger work or book in which it existed.²⁵ For copyright purposes, one looks primarily at the format in which the work is released onto the market. That does of course not mean that each part of a work can no longer attract copyright when looked at in isolation. As was explained above, each part that passes the originality requirement attracts copyright.

Purely functional works, e.g. instructions for use of a certain product, can in this model also attract copyright protection as long as they pass the originality test. Business competitors are therefore obliged to express their own identical message (in terms of content) in a different format (in terms of expression). One might argue that copyright should leave this field to unfair competition rules, but under the current rules in Europe most of these functional works pass the originality test, unless they are purely factual (see the example given above).

The exclusion of dramatic and musical works

Let us return briefly to the definition that the 1988 Act gives of a 'literary work'.²⁶ A literary work is defined widely as any work that is written, spoken, or sung, and that is not a dramatic or musical work. The exclusion of any work that comes within the definition of a musical or a dramatic work from the category of literary works implements the basic principle that every original work can only fall within a single category of original types of work. This exclusion slightly narrows the category of literary works, but it remains rather wide.

The last point is demonstrated by the fact that a literary work need not be expressed in words or any particular notation: any kind of notation can turn a work into a work that is written.²⁷ As a result of this, a software program that is written in any kind of computer programming language will fall within the category of literary works.

1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide

²⁴ *Sweeney v. Macmillan Publishers Ltd* [2002] RPC 35 at 651. See also *LA Gear Inc. v. Hi-Tec Sports* [1992] FSR 121, per Nourse LJ at 136; *Robin Ray v. Classic FM Ltd* [1998] FSR 622.

²⁵ *Sweeney v. Macmillan Publishers Ltd* [2002] RPC 35 at 651.

²⁶ CDPA 1988, s. 3(1).

²⁷ See Laddie et al. (2000) p. 64.

guidance on protection? Is this issue dealt with by de minimis rules? [In the EU discuss Infopaq and how the case is accommodated in national law].

Originality as a *de minimis* rule

In practice, the historical UK originality requirement requires such a low amount of skill, labour, and judgment to be invested in a literary work that it operates as a *de minimis* rule. Only works that are not substantial enough do not attract copyright protection. A first group of works falls in this category because the amount of skill and labour invested in them is almost non-existent: case law examples include a card containing spaces and directions for eliciting statutory information,²⁸ and an advertisement consisting of four commonplace sentences.²⁹ Recently, it was held that a formula for calculating racing forecasts was not an original literary work; nor were the forecasts produced by using the formula. The calculation was held to be a routine repetitive task that involved feeding the relevant information into a computer and that task did not involve sufficient skill, labour, or judgment to produce an original literary work each time the formula was used.³⁰ This remains the case at present. These works do not attract copyright protection as they do not pass the (current) originality requirement test.

A second group of works falls into this category because the volume of these works is not substantial enough. There is not enough space to distinguish between ideas and expression, if there is an underlying idea at all, and copyright should not be used to monopolize words. Obvious examples in this category are trade marks³¹ and most titles of books, plays, films, etc.³² Cases such as *Infopaq*³³ suggest that very short works can attract copyright, but one needs to keep in mind that this will only be possible if they pass the originality test. I.e. it needs to be possible to identify the author's own intellectual creation and this will by definition only be possible if one can distinguish between that expression and the generic idea underlying the work. In practice this will remain the exception rather than the rule. There is no case law or statutory initiative yet that specifically deals with *Infopaq* and its impact.

1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

Artistic works are defined as follows in section 4 CDPA 1988:

²⁸ *Libraco v. Shaw* (1913) 30 TLR 22.

²⁹ *Kirk v. Fleming Macg Cap Cas* (1928) 44.

³⁰ *Bookmakers' Afternoon Greyhound Services Ltd v. Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723.

³¹ *Exxon Corp. v. Exxon Insurance Consultants International Ltd* [1982] Ch 119; aff'd [1981] 3 All ER 241; copyright should not be used to expand the protection granted by a trade mark to a well-known brand name to an entirely different category of products or services.

³² See *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273, per Lord Hodson at 476 and 286; *Francis Day & Hunter Ltd v. Twentieth Century Fox Corp. Ltd* [1940] AC 112, per Lord Wright at 123.

³³ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, [2009] ECDR 16.

(1) In this Part “artistic work” means—

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
- (b) a work of architecture being a building or a model for a building, or
- (c) a work of artistic craftsmanship.

(2) In this Part—

“building” includes any fixed structure, and a part of a building or fixed structure;

“graphic work” includes—

- (a) any painting, drawing, diagram, map, chart or plan, and
- (b) any engraving, etching, lithograph, woodcut or similar work;

“photograph” means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;

“sculpture” includes a cast or model made for purposes of sculpture.

This category of original works is wide in scope and can be subdivided into three parts.³⁴ There are works that are protected irrespective of artistic quality, which are followed by the intermediate group of works of architecture; after this, there are works of artistic craftsmanship. In relation to the last of these works, artistic quality might play a role. This represents a clear departure from the previous categories of work, for which the possession of artistic quality was irrelevant.

Artistic works irrespective of their artistic quality

The various types of works

Graphic works, photographs, sculptures, or collages are protected as artistic works irrespective of their artistic quality.³⁵ ‘Graphic works’ include any painting, drawing, diagram, map, chart, plan, engraving, etching, lithograph, woodcut, or similar work.³⁶ This means that works ranging from a painting by Salvador Dali, to an engineer’s plans and drawings for an electromagnetic train, are protected in the same way: no distinction is made between aesthetic, functional and utilitarian works.

Casts, moulds, or models made for a sculpture are treated as a sculpture.³⁷ The word ‘sculpture’ should, however, be given its normal plain English meaning. In that sense, for a work to be a sculpture in the first place, it must be a three-dimensional work made by an artist’s hand. It follows therefore that not every mould is an artistic work. A mould will not be an artistic work if nothing:

suggests that the manufacturers of [this] mould considered themselves, or were considered by anybody else, to be artists when they designed the [mould] or that

³⁴ CDPA 1988, ss. 1(1)(a) and 4(1)(a), (b), and (c).

³⁵ Ibid., s. 4(1)(a).

³⁶ Ibid., s. 4(2).

³⁷ Ibid.

they were concerned in any way with the shape or appearance of what they were making, save for the purpose of achieving a precise functional effect.³⁸

An attempt was also made to keep pace with future technological developments: a photograph was defined as ‘a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film’.³⁹ Any conflict with films, which may be seen as a succession of a huge number of photographs, is thus ruled out.

Technological developments are nonetheless bound to raise questions. Computer and video games involves a succession of frames, and the question has arisen of whether they are to be considered artistic works. The individual frames might be seen as graphic works—but the question was also asked whether the series for frames as an entity could also be considered to be a graphic work, as part of the wider category of artistic works. In *Nova Productions*,⁴⁰ the Court of Appeal held that an artistic work was defined in the Act as including the types of things listed in s. 4, all of which shared the characteristic of being static—that is, non-moving. A series of drawings or frames is therefore a series of graphic works and not a single graphic work or artistic work in itself. Individual frames are graphic works, however, and, as such, they come within the category of artistic works. Section 4 therefore also covers images that are generated on a screen and bitmap files.

The originality requirement for this first group of artistic works is the same as that for all previous types of work. The work should not be copied, should originate from the author, and its creation should involve the minimal amount of skill and labour.⁴¹ That originality relates to artistic matters, rather than, for example, to technical matters in relation to the content of the drawing. The term ‘artistic’ should be defined here as anything that is visually significant.⁴² That minimal amount of skill and labour is clearly present when a photographer makes a photograph from a picture⁴³ or any other single static object.⁴⁴ This is shown by the choice of the angle under which the picture is taken, the exposure time, the degree of focus, the positioning of the object, etc.⁴⁵ Often the skill, and therefore the originality, of the photographer is found in reproducing faithfully what is in front of the lens. And the visually significant aspect of the work is found not in the scene or object before the lens, but in the image of it, which is produced on the photograph. Other good examples are a woodcut made from a drawing⁴⁶ and the label design for a sweet tin.⁴⁷

³⁸ *Metix (UK) Ltd v. GH Maughlan (Plastics) Ltd* [1997] FSR 718, per Laddie J.

³⁹ CDPA 1988, s. 4(2).

⁴⁰ *Nova Productions Ltd v. Mazooma Games Ltd & ors; Nova Productions Ltd v. Bell Fruit Games Ltd* [2007] RPC 25 (CA).

⁴¹ On that basis the work becomes the author’s own intellectual creation.

⁴² *Interlego AG v. Tyco Industries Inc.* [1989] AC 217, per Lord Oliver at 266; *Ultra Marketing (UK) Ltd & Thomas Alexander Scott v. Universal Components Ltd*, judgment of 12 March 2004, Ch D, unreported.

⁴³ *Graves’ Case* (1869) LR 4 QB 715. For a detailed analysis of copyright in relation to photographs, see Y. Gendreau, A. Nordemann and R. Oesch (1999) *Copyright and Photographs*, London: Kluwer Law International.

⁴⁴ *Antiquesportfolio.com plc v. Rodney Fitch & Co. Ltd* [2001] FSR 23. There may also be cases in which the person who arranges the scene that is to be photographed specifically for a picture to be taken is the joint author of the photograph. That will, however, not be the case of any later pictures taken of the same scene without authorization: see *Creation Records v. News Group* [1997] EMLR 444.

⁴⁵ *Antiquesportfolio.com plc v. Rodney Fitch & Co. Ltd* [2001] FSR 23; see K. Garnett, G. Davies and G. Harbottle (2010) *Copinger and Skone James on Copyright*, 16th edn, London: Sweet and Maxwell, pp. 152–153; K. Garnett, ‘Copyright in photographs’ [2000] EIPR 229.

⁴⁶ Or a coin engraved in three dimensions from a drawing: *Martin v. Polyplas Manufacturers Ltd* [1969] NZLR 1046; see also *Wham-O Manufacturing Co. v. Lincoln Industries Ltd* [1985] RPC 127, the New Zealand

But the skill and labour does not necessarily need to be artistic: a plan for a technical device containing three concentric circles was protected, because technical judgment was involved in drawing them to precise measurements, which allowed the technical device to work.⁴⁸ Meanwhile, a plan containing a design for toy bricks that was only different from an earlier plan because minor variations were mentioned in words and figures, which are not themselves artistic works, fell foul of the originality requirement and was not awarded distinct copyright.⁴⁹

A definition of 'a sculpture'

One of the characteristics of the statutory provision on artistic works is that it does not define the concept of an artistic work or the concept of any of the works it gives as examples of artistic works. The Court of Appeal has now attempted to define the concept of a 'sculpture' in *Lucasfilm v. Ainsworth*.⁵⁰ Mr Ainsworth has produced the helmet worn by the Stormtroopers in the first three Star Wars film produced by Lucasfilm. He did so on the basis of a painting and a clay model that were supplied to him. Thirty years on he started to sell these helmets as memorabilia and Lucasfilm sued for copyright infringement. In the course of the litigation the question arose whether the helmet was a sculpture. Both Mann J at first instance and the Court of Appeal draw a firm line between the concept of a sculpture as an artistic work on the one hand and the concept of a design on the other hand. This is done primarily on the basis of the intention with which the work has been created. Sculptures as artistic works are created for their visual aspect. This has nothing to do with artistic value or merit but it permits to distinguish them from designs that are created primarily for their utilitarian value, i.e. they are functional objects. Sculptures may also have a utilitarian function and value, but they are sculptures in as far as they were primarily created with the visual aspect in mind, i.e. they were created to attract attention to their visual aspect. Designs on the other hand are created to have a utilitarian function even if that does not stop them from also being appreciated for their visual aspect. One could think in the latter case of little statues of soldiers, i.e. lead soldiers, that are designed as toys for kids to play with, but that may also be visually attractive. Statues sold in a gallery and created for their visual aspect remain sculptures on the other hand despite the fact that the buyer later uses them in a utilitarian way as functional objects, e.g. a bookstands. In the case at issue it was held that the helmets were primarily created as functional objects to form part of the costume of the Stormtroopers and to express an aspect of their character, rather than for their visual aspect. They therefore failed to come within the scope of the definition of a sculpture as an artistic work. Or as the Court of Appeal put it (borrowing from the wording used by Mann J):

frisbee case in which wooden models from which moulds for the plastic frisbees were made were protected as sculptures, while the moulds themselves were protected as engravings.

⁴⁷ *Tavener Rutledge v. Specters* [1959] RPC 355.

⁴⁸ *Solar Thomson Engineering Co. Ltd v. Barton* [1977] RPC 537 at 558.

⁴⁹ *Interlego AG v. Tyco Industries Inc.* [1989] AC 217, [1988] 3 All ER 949.

⁵⁰ *Lucasfilm Limited, Star Wars Productions Limited, Lucasfilm Entertainment Company Limited v. Andrew Ainsworth, Shepperton Design Studios Limited*, judgment of 16 December 2009, [2009] EWCA Civ 1328 (CA).

'First, the original Stormtrooper helmet. This has, as its genesis, the McQuarrie paintings. The purpose of the helmet was that it was to be worn as an item of costume in a film, to identify a character, but in addition to portray something about that character — its allegiance, force, menace, purpose and, to some extent, probably its anonymity. It was a mixture of costume and prop. But its primary function is utilitarian. While it was intended to express something, that was for utilitarian purposes. While it has an interest as an object, and while it was intended to express an idea, it was not conceived, or created, with the intention that it should do so other than as part of character portrayal in the film. That, in my view, does not give it the necessary quality of artistic creation inherent in the test suggested by Laddie J. Not everything which has design appeal is necessarily a sculpture. I think that the ordinary perception of what is a sculpture would be over-stretched by including this helmet within it, and when rationalised the reasons are those just given. It is not that it lacks artistic merit; it lacks artistic purpose. I therefore find that the Stormtrooper helmet is not a sculpture.

The same reasoning applies to the armour, and to the other helmets. They all shared the same sort of original purpose.

He took the same view about the toy stormtroopers:-

Next, it is necessary to consider the toy Stormtroopers, and other characters, which are taken as being reproductions of the armour and helmets for the purposes of section 52. These are, as already described, articulated models which are sold as toys and which are intended for the purposes of play. Play is their primary, if not sole, purpose. While their appearance is obviously highly important (if they did not look like the original, the child would not be so interested) they are not made for the purposes of their visual appearance as such. While there is no accounting for taste, it is highly unlikely that they would be placed on display and periodically admired as such. The child is intended to use them in a (literally) hands-on way, in a form of delegated role play, and that is doubtless how they are actually used. That means, in my view, they are not sculptures. They can be distinguished from the model in Britain which apparently had a significant element of being admirable for its own visual sake. That does not apply to the Stormtrooper, whose only real purpose is play. In reaching this conclusion I am not saying that the Britain model is better at what it portrays than the Stormtrooper model. That would be to make judgments about artistic quality, which the statute understandably forbids. It is making a judgment about whether there is anything in the model which has an artistic essence, in the sense identified above. I conclude that there is not.⁵¹

This approach does of course fall short of the aim to provide a precise definition of a sculpture. Based on the general rule that the visual aspect and the aim with which the work

⁵¹ Ibid at paragraphs 51 and 52 of the judgment.

was created are important factors the Court of Appeal approves the approach taken by Mann J and list a number of considerations that can assist the court in deciding whether or not it finds itself in the presence of a sculpture:

- i. The normal use of the word sculpture had to be considered.
- ii. The concept could extend beyond what would normally be understood as a sculpture in the sense of a work in an art gallery.
- iii. It would be inappropriate to stray too far from normal considerations of what is a sculpture.
- iv. No judgment may be made about artistic merits.
- v. Not every three dimensional representation of a concept is a sculpture.
- vi. A sculpture has visual appeal as part of its purpose.
- vii. An object having an additional use may also qualify as a sculpture but it must still have a visual appeal to qualify.
- viii. The purpose for which the object was created should be considered.
- ix. The process of fabrication is relevant but not determinative.⁵²

The aim with which the work was created is an important factor, but all these important considerations are to be taken into account and none overrides the other.

Works of architecture

A second group of artistic works comprises works of architecture.⁵³ Buildings or models for a building, which are commonly used to attract potential investors, fall into this group, but the architect's plans are protected as a graphic work and fall into the previous group. A model made of a building also falls outside of this group.

Section 4(1)(b) does not contain the rule that works in this group are protected irrespective of their artistic quality. This omission means that we have to consider the originality requirement carefully. It is submitted that artistic quality is not required: the addition of the additional line in s. 4(1)(a) was necessary to avoid all arguments about the artistic quality of such items as a sculpture that consists only of a rectangular piece of metal. Such arguments do not normally arise concerning buildings and it was not necessary to specify once more that the originality requirement is not an artistic quality test.⁵⁴

Works of artistic craftsmanship⁵⁵

Works of artistic craftsmanship comprise the last—but, admittedly, the most difficult—part of the category of artistic works. Many items or artefacts might be called works of craftsmanship. Jewellery made to a special design, furniture, clothing, or cutlery can all be called works of craftsmanship. The Act offers no definition of this term, but, through the inclusion of the word 'artistic', makes it clear that some artistic quality is required if a work of craftsmanship is to attract copyright protection.

Hensher v. Restawhile

The House of Lords was given the opportunity to consider the issues raised by works of artistic craftsmanship in *George Hensher Ltd v. Restawhile Upholstery (Lancs) Ltd*.⁵⁶ This case

⁵² A full explanation of the nine factors is found at paragraph 54 of the judgment.

⁵³ CDPA 1988, s. 4(1)(b).

⁵⁴ Along the same lines. Laddie et al. (2000) pp. 194–5; cf W. Cornish (1999) *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 4th edn, London: Sweet and Maxwell, p. 390.

⁵⁵ CDPA 1988, s. 4(1)(c).

⁵⁶ [1976] AC 64; aff'd [1974] 2 All ER 420.

was concerned with a prototype for a suite of furniture, the boat shape of which was said, by the House, to have given it a particular low-brow appeal. The first important issue is whether artistic quality is required and what level must be attempted or reached. The House of Lords disagreed with the lower court, which had held that the work qualified for copyright, and the judgment makes it clear that some artistic quality is required. The fact that the work is a work of craftsmanship that is not purely utilitarian is not sufficient; artistry and craftsmanship are both required. This is the real significance of the judgment, because this is the only point on which their Lordships agreed. Lord Reid and Lord Morris seem to think that a prototype can never satisfy the artistry requirement, because it is, by definition, not intended to have any value or permanence.⁵⁷ It is submitted that the intention of the craftsman is more relevant to a second and separate issue.

Should one look at the craftsman's intention to create something artistic or should one focus on the public's perception of artistic quality? The Court of Appeal had suggested that one should ask whether the public would purchase the thing for its aesthetic appeal, rather than for its functional utility,⁵⁸ but this approach was rejected by the House of Lords. Lord Simon of Glaisdale suggested that the Court of Appeal's approach was wrong, because aesthetic appeal was derived from functional utility and vice versa in the English aesthetical tradition.⁵⁹ But the speeches do not offer a clear-cut alternative approach. Lord Morris and Viscount Dilhorne suggest that an objective approach on the basis of a detached judgment of the work, without giving priority to the craftsman's intention or the perception by the public, is the better approach.⁶⁰ Lord Kilbrandon⁶¹ and Lord Simon⁶² attach more importance to the intention of the craftsman, although Lord Simon would also look at the work. And Lord Reid suggested that a work of craftsmanship could only be artistic if a substantial part of the public valued it positively for its appearance.⁶³

Some further guidance is provided by *Merlet v. Mothercare*.⁶⁴ The criterion suggested by Walton J is whether the craftsman had the conscious purpose of creating a work of art.⁶⁵ In his view, the work must be a work of art and he considered this to be the common ground in the speeches in the House of Lords in the *Hensher* case. This leads to the conclusion that the intention of the creator prevails. This case was concerned with a prototype of a cape for babies, called 'Raincosy', and provides helpful guidance by making it clear that only the work itself should be submitted to the test; the use of the work should not be taken into account. In this case, this meant that the cape should be considered without a baby in it and one should clearly not look at the combination of a mother wearing the baby in a baby sling, with the baby protected by the 'Raincosy'.

A last interesting point is that the judge can rely on expert witnesses to determine whether the work meets the relevant standards. Their Lordships did not adopt a common position in this respect in the *Hensher* case, but it is clear that they all refer to expert evidence as a determining factor.

⁵⁷ Ibid. at 77, 80, 423, and 425.

⁵⁸ [1976] AC 64 at 71, [1973] 3 All ER 414 at 419.

⁵⁹ [1976] AC 64 at 90–2; aff'd [1974] 2 All ER 420 at 433–5.

⁶⁰ Ibid. at 81, 86, 426, and 430.

⁶¹ Ibid. at 97 and 439.

⁶² Ibid. at 95 and 437.

⁶³ Ibid. at 78 and 424; see also *Cuisenaire v. Reed* [1963] VR 719 for a similar approach.

⁶⁴ *Merlet v. Mothercare plc* [1986] RPC 115. The case went up to the Court of Appeal, but only the point of infringement of the drawing was considered: see [1986] RPC 115.

⁶⁵ [1984] FSR 358.

Uncertainty remains

All of this leaves us with a considerable amount of uncertainty. It is not clear what level of artistic quality is required, and no proper and comprehensive test is available. In practice, no problems arise for handcrafted jewellery and similar items, but the position for machine-made objects is problematic. In *Hensher*, Lord Simon seems to suggest that this should not disqualify an object and that copyright protection would still be possible,⁶⁶ but Lord Reid seems to disagree.⁶⁷ The problem is potentially aggravated if the object is utilitarian in nature and is produced in mass. This is especially the case, because a lot of money is invested in the development of these objects. This situation is particularly regrettable, because this category of works is becoming more and more important now that a proper industrial design right has been created. This will create more intellectual property activity in this area, and requires a clear delimitation of the copyright and design areas respectively—all of which is hampered by the absence of a clear definition of what constitutes a work of artistic craftsmanship.

No clear solution is available either for the situation in which one person supplies the craftsmanship, but another supplies the idea for the work of artistic craftsmanship. An old precedent⁶⁸ suggests that no copyright is available in such a case, but it is submitted that this approach is wrong as long as the craftsman's contribution gives the required level of artistic quality to the work.⁶⁹ A recent case goes even further, and allows the craftsman and the artist to be two separate persons.⁷⁰

This situation of twenty years' legal uncertainty is undesirable and unacceptable. The scope of copyright protection is, in general, extremely wide, which allows it to be used to prevent unfair competition. The stricter requirements for works of artistic craftsmanship are an exception to this rule. But even if, as submitted above, one would prefer a narrower scope of copyright protection coupled with a proper unfair competition tort, it is hard to justify why works of artistic craftsmanship should be treated differently. This is clearly an area in which statutory clarification would be desirable.

Towards a way forward

What we have described above is the generally accepted position. We think, however, that the case law allows for an alternative interpretation that may clarify things on a number of points.

This interpretation starts from Lord Simon's speech in the *Hensher* case: what is protected is a work of artistic craftsmanship, not an artistic work of craftsmanship.⁷¹ A glazier, a plumber, and others are all craftsmen,⁷² although it is clear that the legislator did not seek to protect all of their professional activities, because craftsmanship requires only that one is able to make something in a skilful way—that is, that one knows one's trade properly.⁷³ The purpose was to protect a certain type of craftsmanship and the legislator

⁶⁶ [1976] AC 64 at 90–2; aff'd [1974] 2 All ER 420 at 433–5.

⁶⁷ Ibid. at 77 and 423.

⁶⁸ *Burke & Margot Burke v. Spicers Dress Designs* [1936] Ch 400.

⁶⁹ Some more recent decisions expressed disagreement with the case: see *Radley Gowns Ltd v. C Spyrou* [1975] FSR 455, per Oliver J; *Bernstein v. Sydney Murray* [1981] RPC 303, per Fox J; *Merlet v. Mothercare plc* [1986] RPC 115, per Walton J at 123–4.

⁷⁰ *Vermaat & Powell v. Boncrest Ltd* [2001] FSR 43.

⁷¹ *George Hensher Ltd v. Restawhile Upholstery (Lancs) Ltd* [1976] AC 64 at 94; aff'd [1974] 2 All ER 420, per Lord Simon at 437.

⁷² Ibid., per Lord Simon at 91 and 434.

⁷³ See *Vermaat & Powell v. Boncrest Ltd* [2001] FSR 143.

attempted to distinguish that activity by calling it 'artistic craftsmanship'.⁷⁴ The glazier who makes stained-glass windows, for example, engages in artistic craftsmanship.⁷⁵ In making the distinction, the judge can rely on the evidence provided by expert witnesses.⁷⁶

It follows from this starting point that it is not required that each individual work produced is a work of art, as long as it is the result of an activity that is considered, by the relevant circles, to be an activity of artistic craftsmanship as opposed to ordinary craftsmanship. This brings this type of work in line with the rest of the copyright works, for which no artistic value of the individual work is required, and leads to the application of the normal originality requirement to the individual work.

Or does it?

In deciding whether artistic craftsmanship is involved, the expert evidence will be directed towards the fact that '*artists have vocationally an aim and impact which differ from those of the ordinary run of humankind*'.⁷⁷ This covers both the intention of the creator and the result of his or her activity.⁷⁸ So the work that is produced is taken into account in deciding whether the activity is artistic in nature.⁷⁹ But this refers to the work of the author and the relevant kind of activity in general in requiring some artistic level, and has the advantage of not referring to the individual piece of work under consideration for the purpose of copyright. Artistic craftsmanship thus involves a type of work with material that requires manual dexterity, which leads to the creation of an object that certain members of the public wish to acquire and retain for its visual appearance, rather than for its functional purpose. In this test, the artistic element applies to the type of work carried out by the craftsman and not to the issue of whether each individual work is a piece of art. When the issue arose in first instance in the *Lucasfilm* case Mann J. adopted this approach and he quoted with approval the decision of Tipping J. in the High Court of New Zealand⁸⁰ who had held that:

"... [F]or a work to be regarded as one of artistic craftsmanship it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in their workmanship. An artist is a person with creative ability who produces something which has aesthetic appeal."⁸¹

It is submitted that this approach could remove some of the doubts present in the speeches in the House of Lords and that it would provide us with a workable solution. It would not affect the outcome of the *Hensher* and *Merlet* cases, because both types of activity would be held not to be artistic craftsmanship.

This approach is also reflected in a recent Australian decision. In *Burge v. Swarbrick*,⁸² the High Court of Australia held that, while an exhaustive definition should not be

⁷⁴ *George Hensher Ltd v. Restawhile Upholstery (Lancs) Ltd* [1976] AC 64; aff'd [1974] 2 All ER 420, per Lord Simon at 89–91 and 432–4.

⁷⁵ *Ibid.*, per Lord Simon at 91 and 434.

⁷⁶ *Ibid.*, per Lord Simon at 94 and 437.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Cf *Vermaat & Powell v. Boncrest Ltd* [2001] FSR 143.

⁸⁰ *Lucasfilm Limited, Star Wars Productions Limited, Lucasfilm Entertainment Company Limited v. Andrew Ainsworth, Shepperton Design Studios Limited* [2009] FSR 2, p. 103, at p. 158.

⁸¹ *Bonz Group (Pty) Ltd v. Cooke* [1994] 3 N.Z.L.R. 216. Also repeated by the High Court in London in *Vermaat & Powell v. Boncrest* [2001] FSR 5.

⁸² *Burge v. Swarbrick* [2007] FSR 27 (High Court of Australia).

attempted, it could be said that the determination of whether a work was a work of artistic craftsmanship 'does no turn on assessing the beauty or aesthetic appeal of the work or on assessing any harmony between its visual appeal and its utility'.⁸³ What is vital is the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations: if the expression is fully constrained by functional considerations, there may well be a work of craftsmanship, but it will not amount to a work of artistic craftsmanship. The latter requires creative expression outside the constraints of functional considerations and, as such, it is not incompatible with machine and mass production. There is no antithesis between utility and beauty, or between function and creativity. A work of artistic craftsmanship requires both.

1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- surveillance art, installations, collage.

These forms of expression were not yet discussed by the courts.

- performance art.

The same answer applies here and the fixation requirement would in any case be a further hurdle.

- Conceptual art

The same answer applies here too.

1.5 Are there any judicial decisions/ academic opinions on other forms of expression, whether protected or not (e.g. Perfumes)?

There are no judicial decision, but some years ago there was a brief academic debate on whether complex multimedia works could be protected by copyright as they need to fit into a single category of works contained in the act (the UK operates a closed list of categories of works).

1.6 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)

The basis of protection here is the broadcast in which the Premier League and other sport organisers are supposed to have rights. The cases concerned are now pending at the ECJ: *Union of European Football Associations (UEFA) v Euroview Sport Ltd*, Chancery Division 16 April 2010 [2010] EWHC 1066 (Ch); [2010] Eu. L.R. 583; *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 1411 (Ch), [2008] U.K.C.L.R. 329.

⁸³ Ibid. at 708.

2. Creativity – the Originality Standard

2.1 How does your legislation set out the requisite originality standard?

The CDPA 1988 does not set out an originality requirement. It is implied.

2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

Leaving to one side the definition of works of ‘artistic craftsmanship’ that was discussed above a single test of originality is applied across the board. The most recent discussion in the case law was in the Newspaper Licensing case, which Lord Hoffmann argues is in full compliance with what the ECJ later decided in *Infopaq*.

The position can be summarised as follows:

The originality requirement

All works in this first category have in common the originality requirement. Originality should not, however, be taken in the normal sense: neither novelty, nor innovation is required; the starting point is that the work is not copied and originates from the author.⁸⁴ The author must produce his or her own expression of the idea, but the test to establish whether the work originates from the author is in origin only a minimum effort standard. It is not required that the idea is new, because the *idea* is not covered by copyright at all. A radically new and different expression of the idea of the passionate love story between two people with irreconcilable cultural backgrounds set in outer space is equally not required; the author’s own expression of the classic *Romeo and Juliet* tale will suffice. The author must only have expended ‘skill, judgment and labour’, or ‘selection, judgment and experience’, or ‘labour, skill and capital’ in creating the work.⁸⁵

In reality, two cumulative requirements are involved: firstly, the work must originate from the author; secondly, there must have been a minimum investment by the author of skill, judgment, and labour. Both requirements have to be met. The investment of skill, judgment, and labour merely in the process of copying someone else’s work cannot confer originality.⁸⁶ But even if that threshold is low, works that do not meet this minimum standard will not attract copyright protection: a copy that incorporates some minor alterations of a work which is no longer protected under copyright, for example, will not attract copyright.⁸⁷ Even if the content of a work may be nothing more than a compilation of existing elements, some skill and labour must have been invested in the way in which those elements are organized and expressed.⁸⁸ On the one hand, that skill and labour must not be so trivial that it could be characterized as a purely mechanical exercise; on the other,

⁸⁴ *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273, per Lord Pearce at 479 and 291; *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601, per Peterson J at 609.

⁸⁵ *Ibid.*

⁸⁶ This was reconfirmed by the Court of Appeal in *Biotrading & Financing OY v. Biohit Ltd* [1998] FSR 109 at 116; see also Lord Oliver’s opinion in *Interlego AG v. Tyco Industries Inc.* [1989] AC 217 at 258.

⁸⁷ See *Interlego AG v. Tyco Industries Inc.* [1989] AC 217, [1988] 3 All ER 949.

⁸⁸ See *Cramp (GA) & Sons Ltd v. Smythson* [1944] AC 329, [1944] 2 All ER 92.

creativity, as such, is not required either.⁸⁹ Football pool coupon lists, for example, can be protected, but only if it can be shown that the presentation of the material is special: it must be shown that the author has invested skill and labour in the way in which the table is organized. There must be '*a relation of creation between the work and the author whatever this act of creation (sometimes only presentation) means*'.⁹⁰ But what amounts to a sufficient amount of independent skill, labour, and judgment is not capable of definition in advance; it has to be determined on the facts of each case.⁹¹

Most other European countries have in origin a slightly higher originality threshold. They define an original work as a work that constitutes the expression of the personality of its author and a work should be the author's own intellectual creation.⁹² This version of originality is found in the European Community Copyright Directives,⁹³ which introduced a very partial harmonization of copyright in the Community.⁹⁴

We will have to come back to this issue when we discuss the relevant types of work in detail. Suffice it to say here that this higher originality requirement has now been included in the Copyright, Designs and Patents Act 1988,⁹⁵ in relation to copyright in databases, as a result of the implementation of the Database Directive.⁹⁶ It is interesting to note though that recent House of Lords decisions seem to depart from a strict interpretation of the 'mere skill and labour' test and the Court of Justice has recently hinted that the harmonized European concept of originality may apply across the board. Harmonisation may therefore be further advanced than one would have thought, which is possible in the absence of a statutory definition of 'originality'. Let us now move away from the historical cases and look in more detail at the recent evolution.

An attempt at clarification in *Hyperion*

The exact meaning of the concept of originality in English law has never been absolutely clear, but a recent case allowed the Court of Appeal to shed some more light on it. In *Hyperion Records v. Lionel Sawkins*,⁹⁷ the question arose of whether originality could be found in a restored musical work. The original musical work by Lalande was out of copyright, but Dr Lionel Sawkins had restored the work by making performing editions that allowed the work to be played again. In doing so, Sawkins had made additions and corrections, but

⁸⁹ See the decision of the Supreme Court of Canada in *The Law Society of Upper Canada v. CCH Canadian Ltd, Thomson Canada Ltd & Canada Law Book Inc.* [2004] SCC 13.

⁹⁰ A. Dietz, 'The artist's right of integrity under copyright law: a comparative approach' (1994) 25 IIC 177 at 182.

⁹¹ *Biotrading & Financing OY v. Biohit Ltd* [1998] FSR 109 at 116.

⁹² For a recent example see *Bettina Rheims v. M. Jakob Gautel and others*, decision of the 1st Civil Division of the French Cour de Cassation (Supreme Court) of 13 November 2008, 40 (2009) 4 IIC 485.

⁹³ See, e.g., Art. 1(3) of the Council Directive of 14 May 1991 on the legal protection of computer programs (1991) OJ L 122/42, now Art. 1(3) of the codified Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16.

⁹⁴ See also the amended draft Directive (1998) OJ L 289/28 and Regulation (2001) OJ C 120/12 on industrial design.

⁹⁵ As s. 3A.

⁹⁶ European Parliament and Council Directive 96/9/EC (1996) OJ L 77/20 and the Copyright and Rights in Databases Regulations 1997.

⁹⁷ [2005] 3 All ER 636, [2005] 1 WLR 3281 (CA).

he had done so with the aim of restoring the work in its original format—that is, as Lalande would have composed it.

A lot has been made in relation to this case of the public policy issue that granting copyright in a restored, out-of-copyright work would hinder access to the work itself. The underlying argument seems to be that the real originality and the real work is that which is out of copyright, and, in that line of thought, granting a new copyright would clash with public policy. The *Hyperion* case offered a unique opportunity to dispel that myth. Copyright only protects a particular expression of a certain idea and not the idea itself. Copyright in a restored or reconstituted version of an out-of-copyright work will protect only the expression of the restored or reconstituted version; everyone remains free to use the out-of-copyright material itself. To use the specific facts of *Hyperion*: granting Lionel Sawkins copyright in his performing editions will not protect anyone from copying Lalande’s music or from making their own performing editions. All they cannot do is use the short cut offered by the existence of the Sawkins’ performing editions by copying these without his consent.

This last point is the most basic expression of the public policy of copyright—namely, to prevent the unauthorized copying of certain material forms of expression. One should therefore be very careful in using the public policy argument in this type of case.

The broad perspective restated

The key point is, however, found in the fact that only certain material forms of expression are, from a public policy point of view, worth protecting by copyright. Only original forms of expression are to be protected.

Let us look at this from a broad perspective. Remember that originality should not be taken in the normal (dictionary) sense here: neither novelty, nor innovation is required; the starting point is that the work is not copied and originates from the author, as the House of Lords made clear in *Ladbroke v. William Hill*.⁹⁸ The author must produce his or her own expression of the idea, but the test to establish whether the work indeed originates from the author is only a minimum effort standard. It is not required that the idea is new, because the idea is not covered by copyright at all. The author must only have expended ‘skill, judgment and labour’, or ‘selection, judgment and experience’, or ‘labour, skill and capital’ in creating the work, in relation to which, two cumulative requirements are involved: that the work must originate from the author and that there must have been a minimum investment by the author of skill, judgment and labour. The investment of ‘skill, judgment and labour’ merely in the process of copying someone else’s work cannot confer originality, as was confirmed by the Court of Appeal in *Biotrading v. Biohit*,⁹⁹ with reference to Lord Oliver’s famous dictum in *Interlego v. Tyco*.¹⁰⁰

But even if the threshold is low, works that do not meet this minimum standard will not attract copyright protection. The question of whether an item that is similar to a copyright work is, in its own right, an original copyright work is a difficult question, in relation to which the Court of Appeal provided some guidance in *Guild v. Eskander Ltd*.¹⁰¹ A piecemeal approach should be guarded against; the question was, instead, whether all—and not just any one or more—of the additional features gave rise to the requisite quality of originality.

⁹⁸ *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273, per Lord Pearce at 479 and 291; *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601, per Peterson J at 609.

⁹⁹ *Biotrading & Financing OY v. Biohit Ltd* [1998] FSR 109 at 116.

¹⁰⁰ *Interlego AG v. Tyco Industries Inc.* [1989] AC 217 at 258.

¹⁰¹ *Guild v. Eskander Ltd* [2003] FSR 23.

The need to look at the work as a whole is crucial and the Court of Appeal also emphasizes this in *Hyperion*. Despite that, some consideration of individual features would be unavoidable in answering that question.

A copy that incorporates some minor alterations of a work that is no longer protected under copyright will not attract copyright.¹⁰² The principle is clearly stated in the *Interlego* case and is widely accepted. Its exact coverage, however, and the answer to the question of whether it can be reconciled with the judgment of the House of Lords in *Walter v. Lane*,¹⁰³ are less clear. The *Hyperion* case obliged the Court of Appeal to rule on these points and we will return to that ruling shortly, but here we will mention only that copyright infringement in a performing edition of a fourth work was ruled out, because there had been only a very limited editorial input by Dr Sawkins.

Even if the content of a work may be nothing other than a compilation of existing elements, some skill and labour must have been invested in the way in which they are organized and expressed.¹⁰⁴ That skill and labour must not be so trivial that it could be characterized as a purely mechanical exercise, but creativity as such is not required either, as can be seen from the decision of the Supreme Court of Canada in *The Law Society of Upper Canada v. CCH Canadian Ltd, Thomson Canada Ltd & Canada Law Book Inc.*¹⁰⁵

There is no better way to conclude this overview of the general approach to originality in English law than to quote Dr Dietz, who wrote that there must be ‘*a relation of creation between the work and the author whatever this act of creation (sometimes only presentation) means*’.¹⁰⁶ With hindsight, these wise words almost sound prophetic in a *Hyperion* context. What amounts to a sufficient amount of independent ‘skill, labour and judgment’ is not capable of definition in advance; it has to be determined on the facts of each case.¹⁰⁷

How does Hyperion apply in practice?

It is now time to return to the somewhat narrower perspective of the *Hyperion* case and to apply these principles in detail. Lord Justice Mummery looks at this from the following angle:

The first question is whether the performing editions are incapable of being regarded as ‘original’ works because Lalande composed the music and Dr Sawkins made his editions of that music with the intention that they should be as close as possible to the Lalande originals.¹⁰⁸

The Court of Appeal answers that question by relying very strongly on the dictum of the House of Lords of over century ago in *Walter v. Lane*.¹⁰⁹ The Court of Appeal suggests that that decision is still good law as a result of the confirmation it received in *Express Newspapers plc v. News (UK) Ltd*.¹¹⁰

¹⁰² See *Interlego AG v. Tyco Industries Inc.* [1989] AC 217, [1988] 3 All ER 949.

¹⁰³ *Walter v. Lane* [1900] AC 539 (HL).

¹⁰⁴ See *Cramp (GA) & Sons Ltd v. Smythson* [1944] AC 329, [1944] 2 All ER 92.

¹⁰⁵ *The Law Society of Upper Canada v. CCH Canadian Ltd, Thomson Canada Ltd & Canada Law Book Inc.* [2004] SCC 13.

¹⁰⁶ Dietz (1994) at 182.

¹⁰⁷ *Biotrading & Financing OY v. Biohit Ltd* [1998] FSR 109 at 116.

¹⁰⁸ *Hyperion Records v. Lionel Sawkins* [2005] 3 All ER 636, [2005] 1 WLR 3281 (CA), at [32] of the judgment.

¹⁰⁹ *Walter v. Lane* [1900] AC 539 (HL), a decision on the Copyright Act 1842 that used a different kind of wording when compared to the CDPA 1988.

¹¹⁰ *Express Newspapers plc v. News (UK) Ltd* [1990] FSR 359 at 365–6.

In *Walter v. Lane*, the House of Lords held that copyright subsisted in shorthand writers' reports of public speeches as 'original literary' works. The Earl of Rosebery had made the speeches in public, with the reporters present. The reporters had made notes in shorthand; they had later transcribed them, corrected, revised, and punctuated them, and they had published them in newspapers as verbatim reports of the speeches. From the copyright point of view adopted by the House of Lords, a speech and a *report* of a speech are two different things. Lord Rosebery was the author of his speeches; the shorthand writers were the authors of their reports of his speeches. They spent effort, skill, and time in writing up their reports of speeches that they themselves had not written. For our current purposes, it is very important to note that the reports were held to be 'original' literary works, even though the intention of the reporters was to produce as accurate a report as possible of a work of which they were not the authors.

This analysis led Lord Justice Mummery to the following conclusion in the *Hyperion* case:¹¹¹

In my judgment, on the application of *Walter v. Lane* to this case, the effort, skill and time which the judge found Dr Sawkins spent in making the 3 performing editions were sufficient to satisfy the requirement that they should be 'original' works in the copyright sense. This is so even though (a) Dr Sawkins worked on the scores of existing musical works composed by another person (Lalande); (b) Lalande's works are out of copyright; and (c) Dr Sawkins had no intention of adding any new notes of music of his own.

This reliance on *Walter v. Lane* cannot be accepted, however, without considering the dictum in the *Interlego* case with which it seems at odds. One has, indeed, in the past derived a *de minimis* rule from the words of Lord Oliver in that case¹¹²—that is, that a copy incorporating some minor alterations of a work that is no longer protected under copyright will not attract copyright. But the question must be asked whether the impact of the following words does not go further:

Take the simplest case of artistic copyright, a painting or photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an 'original' artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality.¹¹³

In other words, does this dictum in any way reverse what was said in *Walter v. Lane* in the context of a somewhat differently worded statutory provision?

It is submitted that the two provisions are not incompatible and that the dictum in *Interlego* needs to be interpreted restrictively. The Court was, after all, dealing with drawings for plastic toy blocks that had barely been touched and the attempt of the producer of the blocks effectively to prolong the term of their protection was all too obvious. Lord Justice Jacob makes this point very clearly in the second (concurring)

¹¹¹ *Hyperion Records v. Lionel Sawkins* [2005] 3 All ER 636, [2005] 1 WLR 3281 (CA), at [36] of the judgment.

¹¹² See, e.g., P. Torremans, *Holyoak and Torremans Intellectual Property Law*, OUP (4th ed., 2005), at p. 175.

¹¹³ *Interlego v. Tyco* [1988] RPC 343, *per* Lord Oliver at 371.

judgment in *Hyperion*.¹¹⁴ Like him, I would like to refer to the authors of the *Modern Law of Copyright*,¹¹⁵ who interpret the dictum in *Interlego* as follows:

However, whilst the remarks made in *Interlego* may be valid if confined to the subject matter then before the Privy Council, they are stated too widely. The Privy Council was there considering fairly simple technical drawings. This is a rather special subject-matter. While the drawing of such a work is more laborious than it looks, it is a fact that any competent draftsman (perhaps, any conscientious amateur) who sets out to reproduce it exactly will almost certainly succeed in the end, because of the mathematical precision of the lines and measurements. This should be contrasted with, eg a painting by Vermeer, where it will be obvious that very few persons, if any, are capable of making an exact replica. Now, assume a number of persons do set out to copy such a painting, each according to his own personal skill. Most will only succeed in making something which all too obviously differs from the original—some of them embarrassingly so. They will get a copyright seeing that in each instance the end result does not differ from the original yet it took a measure of skill and labour to produce. If, however, one of these renders the original with all the skill and precision of a Salvador Dali, is he to be denied a copyright where a mere dauber is not? The difference between the two cases (technical drawing and old master painting) is that in the latter there is room for individual interpretation even where faithful replication is sought to be attempted while in the former there is not. Further, a photographer who carefully took a photograph of an original painting might get a copyright and, if this is so, it is rather hard to see why a copy of the same degree of fidelity, if rendered by an artist of the calibre aforementioned, would not be copyright. These considerations suggest that the proposition under discussion is suspect. It is therefore submitted that, for example, a picture restorer may get a copyright for the result of his efforts. Be that as it may, it is submitted that the *Interlego* proposition is anyway distinguishable where the replicator succeeds in preserving for posterity an original to which access is difficult.¹¹⁶

To quote Jane Ginsburg:¹¹⁷

Reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are *copies* of pre-existing works. This would be the case for photographic and other high quality replicas of works of art.

In conclusion, the two dicta are not incompatible: *Walter v. Lane* sets out the rule, but presupposes some creative input; *Interlego* deals with the other end of the spectrum, at which there is only mere copying.

In the words of Lord Justice Jacob:¹¹⁸

I think the true position is that one has to consider the extent to which the ‘copyist’ is a mere copyist—merely performing an easy mechanical function. The more that is so the less is his contribution likely to be taken as ‘original’.

One should not underestimate the importance for English copyright law of the fact that the Court of Appeal has now, in *Hyperion*, clarified the approach that is to be taken to originality

¹¹⁴ At [79]–[82] of the judgment.

¹¹⁵ H. Laddie, P. Prescott and M. Vitoria (1995) *The Modern Law of Copyright and Designs*, 2nd edn, London: Butterworths.

¹¹⁶ At para. 4.39.

¹¹⁷ J. Ginsburg, ‘The concept of authorship in comparative copyright law’ (2003) 52 DePaul L Rev 1063.

¹¹⁸ *Hyperion Records v. Lionel Sawkins* [2005] 3 All ER 636, [2005] 1 WLR 3281 (CA), at [82] of the judgment.

by reconfirming the dictum in *Walter v. Lane* and by ruling out any conflict with *Interlego*, which is confined to its particular mere copying scenario.

A new general rule in *Infopaq*?

The Court of Justice dealt with the originality issue in the *Infopaq* case.¹¹⁹ The Court was asked essentially to look at copyright infringement and exceptions and limitations, but it accepted that in copyright one needs to know what the work is and whether it attracts copyright before one can deal with infringement and limitations. One cannot infringe what is not protected in the first place and exceptions and limitations necessarily apply to the copyright protection of the work. From that perspective the Information Society Directive¹²⁰ dealt necessarily with the concept of (copyright) works when it harmonized limitations and exceptions for all categories of copyright works. The Directive is not limited in scope to certain categories of copyright works. It does on the other hand not contain a definition of a work, let alone of originality. Nevertheless one needs a definition in order to be able to address the questions on infringement and limitations and exceptions before the Court. Under EU rules of interpretation these undefined concepts are then given an autonomous interpretation, i.e. one does not refer back to the law of the Member States.¹²¹ The Court then finds that in EU law reference is made to the Software and Database Directives, as this is also the case in the Information Society Directive, and in those two directives the only indication that is found is that of the originality as the work being ‘the author’s own intellectual creation’. In the absence of conflicting elements of a common definition the Court therefore accepted that across the EU the Directive now imposes that concept of originality for all categories of works.¹²²

One can see this as harmonization via the back door or as the imposition of a higher originality criterion on countries such as the United Kingdom or one can see it as the correct application of the rules of interpretation to the provisions of the Information Society Directive to which all Member States agreed. Be that as it may, one needs to ask the question whether this decision changes a lot in UK copyright law. Arguably it does not change a lot in relation to original literary, dramatic, musical or artistic works. Recent decisions, such as *Hyperion*¹²³, had paid lip service to the skill and labour idea, but they had emphasized the point that the author must produce his or her own expression of the idea. In doing so the author surely does not copy and invests his or her own skill and judgment. The question then arises how one ascertains that the author produces his or her own expression of the idea. Where does the originality lie? What is the original contribution of the author? The cases clearly show that a mere copy is not what one is looking for and that the author’s own individual interpretation is needed as a minimum requirement. That is not the same as requiring creativity or artistic value, but it is a particular kind of skill and labour

¹¹⁹ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, [2009] ECDR 16.

¹²⁰ Directive 2001/29/EU of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

¹²¹ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, [2009] ECDR 16, at [27].

¹²² *Ibid*, at [37].

¹²³ *Hyperion Records v. Lionel Sawkins* [2005] 3 All ER 636, [2005] 1 WLR 3281 (CA).

and not mere sweat of the brow. The House of Lords made this specifically clear when it argued that one needs to look at the reason why a work is given copyright protection.¹²⁴ For each category of works there is a specific 'original' contribution that is required. For literary works it is literary originality and for artistic works it is artistic originality and so on. That approach cannot be reconciled with a definition of originality as mere sweat of the brow. A specific kind of skill and labour is required and it is necessarily put in by the author. Without going into issue of (literary or artistic) merit, that clearly links originality to the input into the expression of the idea by the author. In choosing that expression the author will necessarily use its intellect and it therefore becomes 'the author's own intellectual creation'.

The House of Lords may have come to this position from a (specific) skill and labour angle, but the outcome differs little from that from the outcome reached by the French Supreme Court that started from an expression of the author's personality angle. The French Supreme Court¹²⁵ recently held that the inscription of the word 'Paradis'¹²⁶ in gilded letters with a special effect and graphic form on an old door with a lock in the shape of a cross, embedded in a dilapidated wall with peeling paint, is a combination that involves aesthetic choices that reflect the author's personality. That led the Court to the conclusion that the artist's conceptual approach, which consists of placing a word in a specific place and changing its usual meaning, constitutes an original material creation that enjoys copyright protection. One sees an emphasis on concepts of personality and creativity that one would not find in a House of Lords judgment, but that use of wording cannot hide that one can also decide the case by using the UK wording that the artist invested his specific skill, labour and judgment and applied it to the work to come to a copyright work as the expression of the author's own intellectual creation. The actual difference may therefore be very small or non-existent, without even taking into account the *Infopaq* harmonization. *Infopaq* may therefore be a mere confirmation of a somewhat higher level of originality being required. This does of course mean that certain works will no longer attract copyright protection in the UK and that copyright can no longer be used as a stopgap solution to protect these works in the absence of a tort of unfair competition.

What may surprise in the French judgment, as well as in the *Infopaq* decision is that small amounts of words, i.e. one and eleven respectively, are seen as potentially constituting a copyright work. *Infopaq* confirms specifically that the originality test applies to parts of the work as well as to the whole work.¹²⁷ The question whether a part of a work attracts copyright protection is therefore dependent on whether the part is original and involves therefore an element of the author's own intellectual creation (and this is not necessarily a low hurdle that can be passed easily). That excludes non-original and copied parts, but it also means that parts of the work can attract protection and that using or copying them can amount to an infringement. It is arguable that the old UK system offered less protection in this area and that *Infopaq* therefore broadens the scope of copyright. That conflicts with the idea that UK copyright traditionally combines this weaker form of protection with a

¹²⁴ *Newspaper Licensing Agency Ltd v. Marks & Spencer plc* [2001] 3 WLR 290 at [19] (HL).

¹²⁵ *Bettina Rheims v. M. Jakob Gautel and others*, decision of the 1st Civil Division of the French Cour de Cassation (Supreme Court) of 13 November 2008, 40 (2009) 4 IIC 485.

¹²⁶ Meaning 'paradise'.

¹²⁷ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, [2009] ECDR 16, at [39].

restrictive approach to limitations and permitted exceptions. Our limitations and exceptions may now become too narrow and copyright owners may get an unduly broad protection (to the detriment of the user) if protection is also available to parts of the work.

2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has “sweat of the brow” been treated in recent case-law?]

Yes it is the same standard. See question 2.2.

2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).

There is protection, but in practice it takes the form of a database. Copyright then focuses on the selection and the arrangement of the materials. The content itself would then need to meet the requirements for a literary work to get separate copyright protection.

3. Achieving Access for the visually impaired

3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?

This matter is now dealt with in detail by section 31 A-F CDPA 1988, as amended:

[F131A Making a single accessible copy for personal use

(1) If a visually impaired person has lawful possession or lawful use of a copy (“the master copy”) of the whole or part of—

(a) a literary, dramatic, musical or artistic work; or

(b) a published edition,

which is not accessible to him because of the impairment, it is not an infringement of copyright in the work, or in the typographical arrangement of the published edition, for an accessible copy of the master copy to be made for his personal use.

(2) Subsection (1) does not apply—

(a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it; or

(b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

(3) Subsection (1) does not apply in relation to the making of an accessible copy for a particular visually impaired person if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(4) An accessible copy made under this section must be accompanied by—

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(5) If a person makes an accessible copy on behalf of a visually impaired person under this section and charges for it, the sum charged must not exceed the cost of making and supplying the copy.

(6) If a person holds an accessible copy made under subsection (1) when he is not entitled to have it made under that subsection, the copy is to be treated as an infringing copy, unless he is a person falling within subsection (7)(b).

(7) A person who holds an accessible copy made under subsection (1) may transfer it to—

(a) a visually impaired person entitled to have the accessible copy made under subsection (1); or

(b) a person who has lawful possession of the master copy and intends to transfer the accessible copy to a person falling within paragraph (a).

(8) The transfer by a person (“V”) of an accessible copy made under subsection (1) to another person (“T”) is an infringement of copyright by V unless V has reasonable grounds for believing that T is a person falling within subsection (7)(a) or (b).

(9) If an accessible copy which would be an infringing copy but for this section is subsequently dealt with—

(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

(10) In subsection (9), “dealt with” means sold or let for hire or offered or exposed for sale or hire or included in a broadcast or cable programme service.]

Annotations:

Amendments (Textual)

F1S. 31A and cross-heading inserted (31.10.2003) by [2002 c. 33, ss. 1, 8\(2\)](#); [S.I. 2003/2499, art. 2](#)

[F231B Multiple copies for visually impaired persons

(1) If an approved body has lawful possession of a copy (“the master copy”) of the whole or part of—

(a) a commercially published literary, dramatic, musical or artistic work; or

(b) a commercially published edition,

it is not an infringement of copyright in the work, or in the typographical arrangement of the published edition, for the body to make, or supply, accessible copies for the personal use of

visually impaired persons to whom the master copy is not accessible because of their impairment.

(2) Subsection (1) does not apply—

(a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it; or

(b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

(3) Subsection (1) does not apply in relation to the making of an accessible copy if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.

(4) Subsection (1) does not apply in relation to the supply of an accessible copy to a particular visually impaired person if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(5) An accessible copy made under this section must be accompanied by—

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(6) If an approved body charges for supplying a copy made under this section, the sum charged must not exceed the cost of making and supplying the copy.

(7) An approved body making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.

(8) If the master copy is in copy-protected electronic form, any accessible copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection (unless the copyright owner agrees otherwise).

(9) If an approved body continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.

(10) If an accessible copy which would be an infringing copy but for this section is subsequently dealt with—

(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

(11) In subsection (10), “dealt with” means sold or let for hire or offered or exposed for sale or hire or included in a broadcast or cable programme service.

(12) “Approved body” means an educational establishment or a body that is not conducted for profit.

(13) “Supplying” includes lending.]

Annotations: 

✘ **Amendments (Textual)**

F2S. 31B inserted (31.10.2003) by 2002 c. 33, ss. 2, 8(2); S.I. 2003/2499, art. 2

[F331C Intermediate copies and records

(1) An approved body entitled to make accessible copies under section 31B may hold an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but only—

(a) if and so long as the approved body continues to be entitled to make accessible copies of that master copy; and

(b) for the purposes of the production of further accessible copies.

(2) An intermediate copy which is held in breach of subsection (1) is to be treated as an infringing copy.

(3) An approved body may lend or transfer the intermediate copy to another approved body which is entitled to make accessible copies of the work or published edition under section 31B.

(4) The loan or transfer by an approved body (“A”) of an intermediate copy to another person (“B”) is an infringement of copyright by A unless A has reasonable grounds for believing that B—

(a) is another approved body which is entitled to make accessible copies of the work or published edition under section 31B; and

(b) will use the intermediate copy only for the purposes of the production of further accessible copies.

(5) If an approved body charges for lending or transferring the intermediate copy, the sum charged must not exceed the cost of the loan or transfer.

(6) An approved body must—

(a) keep records of accessible copies made under section 31B and of the persons to whom they are supplied;

(b) keep records of any intermediate copy lent or transferred under this section and of the persons to whom it is lent or transferred; and

(c) allow the copyright owner or a person acting for him, on giving reasonable notice, to inspect the records at any reasonable time.

(7) Within a reasonable time of making an accessible copy under section 31B, or lending or transferring an intermediate copy under this section, the approved body must—

(a) notify each relevant representative body; or

(b) if there is no such body, notify the copyright owner.

(8) A relevant representative body is a body which—

(a) represents particular copyright owners, or owners of copyright in the type of copyright work concerned; and

(b) has given notice to the Secretary of State of the copyright owners, or the classes of copyright owner, represented by it.

(9)The requirement to notify the copyright owner under subsection (7)(b) does not apply if it is not reasonably possible for the approved body to ascertain the name and address of the copyright owner.]

Annotations: 

✖ Amendments (Textual)

F3S. 31C inserted (31.10.2003) by 2002 c. 33, ss. 3, 8(2); S.I. 2003/2499, art. 2

[F431D Licensing schemes

(1)Section 31B does not apply to the making of an accessible copy in a particular form if—

(a)a licensing scheme operated by a licensing body is in force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form;

(b)the scheme is not unreasonably restrictive; and

(c)the scheme and any modification made to it have been notified to the Secretary of State by the licensing body.

(2)A scheme is unreasonably restrictive if it includes a term or condition which—

(a)purports to prevent or limit the steps that may be taken under section 31B or 31C; or

(b)has that effect.

(3)But subsection (2) does not apply if—

(a)the copyright work is no longer published by or with the authority of the copyright owner; and

(b)there are reasonable grounds for preventing or restricting the making of accessible copies of the work.

(4)If section 31B or 31C is displaced by a licensing scheme, sections 119 to 122 apply in relation to the scheme as if it were one to which those sections applied as a result of section 117.]

Annotations: 

✖ Amendments (Textual)

F4S. 31D inserted (31.10.2003) by 2002 c. 33, ss. 4, 8(2); S.I. 2003/2499, art. 2

[F531E Limitations, etc. following infringement of copyright

(1)The Secretary of State may make an order under this section if it appears to him that the making of copies—

(a)under section 31B; or

(b)under a licence granted under a licensing scheme that has been notified under section 31D,

has led to infringement of copyright on a scale which, in the Secretary of State's opinion, would not have occurred if section 31B had not been in force, or the licence had not been granted.

(2)The order may prohibit one or more named approved bodies, or one or more specified categories of approved body, from—

- (a) acting under section 31B; or
- (b) acting under a licence of a description specified in the order.
- (3) The order may disapply—
 - (a) the provisions of section 31B; or
 - (b) the provisions of a licence, or a licensing scheme, of a description specified in the order, in respect of the making of copies of a description so specified.
- (4) If the Secretary of State proposes to make an order he must, before making it, consult—
 - (a) such bodies representing copyright owners as he thinks fit; and
 - (b) such bodies representing visually impaired persons as he thinks fit.
- (5) If the Secretary of State proposes to make an order which includes a prohibition he must, before making it, consult—
 - (a) if the proposed order is to apply to one or more named approved bodies, that body or those bodies;
 - (b) if it is to apply to one or more specified categories of approved body, to such bodies representing approved bodies of that category or those categories as he thinks fit.
- (6) An approved body which is prohibited by an order from acting under a licence may not apply to the Copyright Tribunal under section 121(1) in respect of a refusal or failure by a licensing body to grant such a licence.]

Annotations: 

 **Amendments (Textual)**

F5S. 31E inserted (31.10.2003) by 2002 c. 33, ss. 5, 8(2); S.I. 2003/2499, art. 2

[F631F Definitions and other supplementary provision for sections 31A to 31E

(1) This section supplements sections 31A to 31E and includes definitions.

(2) A copy of a copyright work (other than an accessible copy made under section 31A or 31B) is to be taken to be accessible to a visually impaired person only if it is as accessible to him as it would be if he were not visually impaired.

(3) “Accessible copy”, in relation to a copyright work, means a version which provides for a visually impaired person improved access to the work.

(4) An accessible copy may include facilities for navigating around the version of the copyright work but may not include—

- (a) changes that are not necessary to overcome problems caused by visual impairment; or
- (b) changes which infringe the right (provided by section 80) not to have the work subjected to derogatory treatment.

(5) “Approved body” has the meaning given in section 31B(12).

(6) “Lending”, in relation to a copy, means making it available for use, otherwise than for direct or indirect economic or commercial advantage, on terms that it will or may be returned.

(7) For the purposes of subsection (6), a loan is not to be treated as being for direct or indirect economic or commercial advantage if a charge is made for the loan which does not exceed the cost of making and supplying the copy.

(8) The definition of “lending” in section 18A does not apply for the purposes of sections 31B and 31C.

(9) “Visually impaired person” means a person—

(a) who is blind;

(b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light;

(c) who is unable, through physical disability, to hold or manipulate a book; or

(d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

(10) The Secretary of State may by regulations prescribe—

(a) the form in which; or

(b) the procedure in accordance with which,

any notice required under section 31C(7) or (8), or 31D(1), must be given.

(11) Any power to make regulations or orders is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.]

3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?

See above.

3.3 Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?

See above.

3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?

4. **Access to the Internet as a Human Right**

4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

No.

4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

N/A

5. **Orphan Works**

5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

No

5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

No

5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

Orphan works were included in part one of the Gowers review, but part two of that made no proposals on this point. The impression is that an EU initiative is awaited.

6. **Graduated Response Laws or Agreements**

6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?

There was a considerable amount of discussion on this point before the last elections. The previous government in the end rushed through a framework legislation in the Digital Economy Act 2010.¹²⁸ A lot of the details remain to be filled in and the new government may in due course change the approach. The system is based on the rightholder notifying the service provider of infringement by its subscribers. The ISP then

¹²⁸ See K. Garnett QC, G. Davies and G. Harbottle, Copinger & Skone James on Copyright, London: Sweet & Maxwell (16th edn, 2010) for a full explanation of the Act.

notifies the subscriber and will have to take action based on its own code of practice (this may lead to termination of the access). OFCOM will de facto only step in if the provider does not have a code of practice.

The current provisions read as follows:

Online infringement of copyright

Ⓐ

3

Obligation to notify subscribers of reported infringements

After section 124 of the Communications Act 2003 insert—

"Online infringement of copyright: obligations of internet service providers

124A

Obligation to notify subscribers of copyright infringement reports

(1)

This section applies if it appears to a copyright owner that—

(a)

a subscriber to an internet access service has infringed the owner's copyright by means of the service; or

(b)

a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service.

(2)

The owner may make a copyright infringement report to the internet service provider who provided the internet access service if a code in force under section 124C or 124D (an “initial obligations code”) allows the owner to do so.

(3)

A “copyright infringement report” is a report that—

(a)

states that there appears to have been an infringement of the owner's copyright;

(b)

includes a description of the apparent infringement;

(c)

includes evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered;

(d)

is sent to the internet service provider within the period of 1 month beginning with the day on which the evidence was gathered; and

(e)

complies with any other requirement of the initial obligations code.

(4)

An internet service provider who receives a copyright infringement report must notify the subscriber of the report if the initial obligations code requires the provider to do so.

(5)

A notification under subsection (4) must be sent to the subscriber within the period of 1 month beginning with the day on which the provider receives the report.

- (6) A notification under subsection (4) must include—
- (a) a statement that the notification is sent under this section in response to a copyright infringement report;
 - (b) the name of the copyright owner who made the report;
 - (c) a description of the apparent infringement;
 - (d) evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered;
 - (e) information about subscriber appeals and the grounds on which they may be made;
 - (f) information about copyright and its purpose;
 - (g) advice, or information enabling the subscriber to obtain advice, about how to obtain lawful access to copyright works;
 - (h) advice, or information enabling the subscriber to obtain advice, about steps that a subscriber can take to protect an internet access service from unauthorised use; and
 - (i) anything else that the initial obligations code requires the notification to include.
- (7) For the purposes of subsection (6)(h) the internet service provider must take into account the suitability of different protection for subscribers in different circumstances.
- (8) The things that may be required under subsection (6)(i), whether in general or in a particular case, include in particular—
- (a) a statement that information about the apparent infringement may be kept by the internet service provider;
 - (b) a statement that the copyright owner may require the provider to disclose which copyright infringement reports made by the owner to the provider relate to the subscriber;
 - (c) a statement that, following such a disclosure, the copyright owner may apply to a court to learn the subscriber's identity and may bring proceedings against the subscriber for copyright infringement; and
 - (d) where the requirement for the provider to send the notification arises partly because of a report that has already been the subject of a notification under subsection (4), a statement that the number of copyright infringement reports relating to the subscriber may be taken into account for the purposes of any technical measures.
- (9)

In this section “notify”, in relation to a subscriber, means send a notification to the electronic or postal address held by the internet service provider for the subscriber (and sections 394 to 396 do not apply)."



4

Obligation to provide infringement lists to copyright owners

After section 124A of the Communications Act 2003 insert—

"124B

Obligation to provide copyright infringement lists to copyright owners

(1)

An internet service provider must provide a copyright owner with a copyright infringement list for a period if—

(a)

the owner requests the list for that period; and

(b)

an initial obligations code requires the internet service provider to provide it.

(2)

A “copyright infringement list” is a list that—

(a)

sets out, in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber, but

(b)

does not enable any subscriber to be identified.

(3)

A subscriber is a “relevant subscriber” in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the initial obligations code."



5

Approval of code about the initial obligations

After section 124B of the Communications Act 2003 insert—

"124C

Approval of code about the initial obligations

(1)

The obligations of internet service providers under sections 124A and 124B are the “initial obligations”.

(2)

If it appears to OFCOM—

(a)

that a code has been made by any person for the purpose of regulating the initial obligations; and

(b)

that it would be appropriate for them to approve the code for that purpose, they may by order approve it, with effect from the date given in the order.

(3)

The provision that may be contained in a code and approved under this section includes provision that—

- (a) specifies conditions that must be met for rights and obligations under the copyright infringement provisions or the code to apply in a particular case;
- (b) requires copyright owners or internet service providers to provide any information or assistance that is reasonably required to determine whether a condition under paragraph (a) is met.
- (4) The provision mentioned in subsection (3)(a) may, in particular, specify that a right or obligation does not apply in relation to a copyright owner unless the owner has made arrangements with an internet service provider regarding—
- (a) the number of copyright infringement reports that the owner may make to the provider within a particular period; and
- (b) payment in advance of a contribution towards meeting costs incurred by the provider.
- (5) The provision mentioned in subsection (3)(a) may also, in particular, provide that—
- (a) except as provided by the code, rights and obligations do not apply in relation to an internet service provider unless the number of copyright infringement reports the provider receives within a particular period reaches a threshold set in the code; and
- (b) if the threshold is reached, rights or obligations apply with effect from the date when it is reached or from a later time.
- (6) OFCOM must not approve a code under this section unless satisfied that it meets the criteria set out in section 124E.
- (7) Not more than one approved code may have effect at a time.
- (8) OFCOM must keep an approved code under review.
- (9) OFCOM may by order, at any time, for the purpose mentioned in subsection (2)—
- (a) approve modifications that have been made to an approved code; or
- (b) withdraw their approval from an approved code, with effect from the date given in the order, and must do so if the code ceases to meet the criteria set out in section 124E.
- (10) The consent of the Secretary of State is required for the approval of a code or the modification of an approved code.
- (11) An order made by OFCOM under this section approving a code or modification must set out the code or modification.
- (12)

Section 403 applies to the power of OFCOM to make an order under this section. (13)

A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament."



6

Initial obligations code by OFCOM in the absence of an approved code

After section 124C of the Communications Act 2003 insert—

"124D

Initial obligations code by OFCOM in the absence of an approved code

(1)

For any period when sections 124A and 124B are in force but for which there is no approved initial obligations code under section 124C, OFCOM must by order make a code for the purpose of regulating the initial obligations.

(2)

OFCOM may but need not make a code under subsection (1) for a time before the end of—

(a)

the period of six months beginning with the day on which sections 124A and 124B come into force, or

(b)

such longer period as the Secretary of State may specify by notice to OFCOM.

(3)

The Secretary of State may give a notice under subsection (2)(b) only if it appears to the Secretary of State that it is not practicable for OFCOM to make a code with effect from the end of the period mentioned in subsection (2)(a) or any longer period for the time being specified under subsection (2)(b).

(4)

A code under this section may do any of the things mentioned in section 124C(3) to (5).

(5)

A code under this section may also—

(a)

confer jurisdiction with respect to any matter (other than jurisdiction to determine appeals by subscribers) on OFCOM themselves;

(b)

provide for OFCOM, in exercising such jurisdiction, to make awards of compensation, to direct the reimbursement of costs, or to do both;

(c)

provide for OFCOM to enforce, or to participate in the enforcement of, any awards or directions made under the code;

(d)

make other provision for the enforcement of such awards and directions;

(e)

establish a body corporate, with the capacity to make its own rules and establish its own procedures, for the purpose of determining subscriber appeals;

(f)

provide for a person with the function of determining subscriber appeals to enforce, or to participate in the enforcement of, any awards or directions made by the person;

- make other provision for the enforcement of such awards and directions; and (g)
- make other provision for the purpose of regulating the initial obligations. (h)
- OFCOM must not make a code under this section unless they are satisfied that it meets the criteria set out in section 124E. (6)
- OFCOM must— (7)
- keep a code under this section under review; and (a)
- by order make any amendment of it that is necessary to ensure that while it is in force it continues to meet the criteria set out in section 124E. (b)
- The consent of the Secretary of State is required for the making or amendment by OFCOM of a code under this section. (8)
- Section 403 applies to the power of OFCOM to make an order under this section. (9)
- A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament." (10)



7

Contents of initial obligations code

After section 124D of the Communications Act 2003 insert—

"124E

Contents of initial obligations code

- The criteria referred to in sections 124C(6) and 124D(6) are— (1)
- that the code makes the required provision about copyright infringement reports (see subsection (2)); (a)
- that it makes the required provision about the notification of subscribers (see subsections (3) and (4)); (b)
- that it sets the threshold applying for the purposes of determining who is a relevant subscriber within the meaning of section 124B(3)(see subsections (5) and (6)); (c)
- that it makes provision about how internet service providers are to keep information about subscribers; (d)
- that it limits the time for which they may keep that information; (e)
- that it makes any provision about contributions towards meeting costs that is required to be included by an order under section 124M; (f)

- (g) that the requirements concerning administration and enforcement are met in relation to the code (see subsections (7) and (8));
 - (h) that the requirements concerning subscriber appeals are met in relation to the code (see section 124K);
 - (i) that the provisions of the code are objectively justifiable in relation to the matters to which it relates;
 - (j) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (k) that those provisions are proportionate to what they are intended to achieve; and
 - (l) that, in relation to what those provisions are intended to achieve, they are transparent.
- (2) The required provision about copyright infringement reports is provision that specifies—
- (a) requirements as to the means of obtaining evidence of infringement of copyright for inclusion in a report;
 - (b) the standard of evidence that must be included; and
 - (c) the required form of the report.
- (3) The required provision about the notification of subscribers is provision that specifies, in relation to a subscriber in relation to whom an internet service provider receives one or more copyright infringement reports—
- (a) requirements as to the means by which the provider identifies the subscriber;
 - (b) which of the reports the provider must notify the subscriber of; and
 - (c) requirements as to the form, contents and means of the notification in each case.
- (4) The provision mentioned in subsection (3) must not permit any copyright infringement report received by an internet service provider more than 12 months before the date of a notification of a subscriber to be taken into account for the purposes of the notification.
- (5) The threshold applying in accordance with subsection (1)(c) may, subject to subsection (6), be set by reference to any matter, including in particular one or more of—
- (a) the number of copyright infringement reports;
 - (b) the time within which the reports are made; and
 - (c)

the time of the apparent infringements to which they relate. (6)

The threshold applying in accordance with subsection (1)(c) must operate in such a way that a copyright infringement report received by an internet service provider more than 12 months before a particular date does not affect whether the threshold is met on that date; and a copyright infringement list provided under section 124B must not take into account any such report.

The requirements concerning administration and enforcement are— (7)

(a) that OFCOM have, under the code, the functions of administering and enforcing it, including the function of resolving owner-provider disputes;

(b) that there are adequate arrangements under the code for OFCOM to obtain any information or assistance from internet service providers or copyright owners that OFCOM reasonably require for the purposes of administering and enforcing the code; and

(c) that there are adequate arrangements under the code for the costs incurred by OFCOM in administering and enforcing the code to be met by internet service providers and copyright owners. (8)

The provision mentioned in subsection (7) may include, in particular— (a)

(a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 124L(2);

(b) provision requiring a copyright owner to indemnify an internet service provider for any loss or damage resulting from the owner's failure to comply with the code or the copyright infringement provisions. (9)

In this section "owner-provider dispute" means a dispute that— (a)

is between persons who are copyright owners or internet service providers; and (b)

relates to an act or omission in relation to an initial obligation or an initial obligations code." (8)

Ⓐ

Progress reports

After section 124E of the Communications Act 2003 insert—

"124F

Progress reports

(1) OFCOM must prepare the following reports for the Secretary of State about the infringement of copyright by subscribers to internet access services.

(2) OFCOM must prepare a full report for— (a)

- the period of 12 months beginning with the first day on which there is an initial obligations code in force; and (b)
- each successive period of 12 months. (3)
- OFCOM must prepare an interim report for— (a)
- the period of 3 months beginning with the first day on which there is an initial obligations code in force; and (b)
- each successive period of 3 months, other than one ending at the same time as a period of 12 months under subsection (2). (4)
- But this is subject to any direction by the Secretary of State under subsection (4). (5)
- The Secretary of State may direct that subsection (3) no longer applies, with effect from the date given in the direction. (6)
- A full report under this section must include— (a)
- an assessment of the current level of subscribers' use of internet access services to infringe copyright; (b)
- a description of the steps taken by copyright owners to enable subscribers to obtain lawful access to copyright works; (c)
- a description of the steps taken by copyright owners to inform, and change the attitude of, members of the public in relation to the infringement of copyright; (d)
- an assessment of the extent of the steps mentioned in paragraphs (b) and (c); (e)
- an assessment of the extent to which copyright owners have made copyright infringement reports; (f)
- an assessment of the extent to which they have brought legal proceedings against subscribers in relation to whom such reports have been made; (g)
- an assessment of the extent to which any such proceedings have been against subscribers in relation to whom a substantial number of reports have been made; and (h)
- anything else that the Secretary of State directs OFCOM to include in the report. (6)
- An interim report under this section must include— (a)
- the assessments mentioned in subsection (5)(a), (e) and (f); and (b)
- anything else that the Secretary of State directs OFCOM to include in the report. (7)

OFCOM must send a report prepared under this section to the Secretary of State as soon as practicable after the end of the period for which it is prepared.

(8)

OFCOM must publish every full report under this section—

(a)

as soon as practicable after they send it to the Secretary of State, and

(b)

in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to have an interest in it.

(9)

OFCOM may exclude information from a report when it is published under subsection (8) if they consider that it is information that they could refuse to disclose in response to a request under the Freedom of Information Act 2000."



9

Obligations to limit internet access: assessment and preparation

After section 124F of the Communications Act 2003 insert—

"124G

Obligations to limit internet access: assessment and preparation

(1)

The Secretary of State may direct OFCOM to—

(a)

assess whether one or more technical obligations should be imposed on internet service providers;

(b)

take steps to prepare for the obligations;

(c)

provide a report on the assessment or steps to the Secretary of State.

(2)

A "technical obligation", in relation to an internet service provider, is an obligation for the provider to take a technical measure against some or all relevant subscribers to its service for the purpose of preventing or reducing infringement of copyright by means of the internet.

(3)

A "technical measure" is a measure that—

(a)

limits the speed or other capacity of the service provided to a subscriber;

(b)

prevents a subscriber from using the service to gain access to particular material, or limits such use;

(c)

suspends the service provided to a subscriber; or

(d)

limits the service provided to a subscriber in another way.

(4)

A subscriber to an internet access service is “relevant” if the subscriber is a relevant subscriber, within the meaning of section 124B(3), in relation to the provider of the service and one or more copyright owners.

(5)

The assessment and steps that the Secretary of State may direct OFCOM to carry out or take under subsection (1) include, in particular—

(a)

consultation of copyright owners, internet service providers, subscribers or any other person;

(b)

an assessment of the likely efficacy of a technical measure in relation to a particular type of internet access service; and

(c)

steps to prepare a proposed technical obligations code.

(6)

Internet service providers and copyright owners must give OFCOM any assistance that OFCOM reasonably require for the purposes of complying with any direction under this section.

(7)

The Secretary of State must lay before Parliament any direction under this section.

(8)

OFCOM must publish every report under this section—

(a)

as soon as practicable after they send it to the Secretary of State, and

(b)

in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to have an interest in it.

(9)

OFCOM may exclude information from a report when it is published under subsection (8) if they consider that it is information that they could refuse to disclose in response to a request under the Freedom of Information Act 2000."



10

Obligations to limit internet access

After section 124G of the Communications Act 2003 insert—

"124H

Obligations to limit internet access

(1)

The Secretary of State may by order impose a technical obligation on internet service providers if—

(a)

OFCOM have assessed whether one or more technical obligations should be imposed on internet service providers; and

(b)

taking into account that assessment, reports prepared by OFCOM under section 124F, and any other matter that appears to the Secretary of State to be relevant, the Secretary of State considers it appropriate to make the order.

(2)
No order may be made under this section within the period of 12 months beginning with the first day on which there is an initial obligations code in force.

(3)
An order under this section must specify the date from which the technical obligation is to have effect, or provide for it to be specified.

(4)
The order may also specify—

(a)
the criteria for taking the technical measure concerned against a subscriber;

(b)
the steps to be taken as part of the measure and when they are to be taken.

(5)
No order is to be made under this section unless—

(a)
the Secretary of State has complied with subsections (6) to (10), and

(b)
a draft of the order has been laid before Parliament and approved by a resolution of each House.

(6)
If the Secretary of State proposes to make an order under this section, the Secretary of State must lay before Parliament a document that—

(a)
explains the proposal, and

(b)
sets it out in the form of a draft order.

(7)

During the period of 60 days beginning with the day on which the document was laid under subsection (6)(“the 60-day period”), the Secretary of State may not lay before Parliament a draft order to give effect to the proposal (with or without modifications).

(8)

In preparing a draft order under this section to give effect to the proposal, the Secretary of State must have regard to any of the following that are made with regard to the draft order during the 60-day period—

(a)
any representations, and

(b)
any recommendations of a committee of either House of Parliament charged with reporting on the draft order.

(9)

When laying before Parliament a draft order to give effect to the proposal (with or without modifications), the Secretary of State must also lay a document that explains any changes made to the proposal contained in the document laid before Parliament under subsection (6).

(10)

In calculating the 60-day period, no account is to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than 4 days."



11

Code by OFCOM about obligations to limit internet access

After section 124H of the Communications Act 2003 insert—

"124I

Code by OFCOM about obligations to limit internet access

(1)

For any period during which there are one or more technical obligations in force under section 124H, OFCOM must by order make a technical obligations code for the purpose of regulating those obligations.

(2)

The code may be made separately from, or in combination with, any initial obligations code under section 124D.

(3)

A code under this section may—

(a)

do any of the things mentioned in section 124C(3) to (5) or section 124D(5)(a) to (g); and

(b)

make other provision for the purpose of regulating the technical obligations.

(4)

OFCOM must not make a code under this section unless they are satisfied that it meets the criteria set out in section 124J.

(5)

OFCOM must—

(a)

keep a code under this section under review; and

(b)

by order make any amendment of it that is necessary to ensure that while it is in force it continues to meet the criteria set out in section 124J.

(6)

The consent of the Secretary of State is required for the making or amendment by OFCOM of a code under this section.

(7)

Section 403 applies to the power of OFCOM to make an order under this section.

(8)

A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament."



12

Contents of code about obligations to limit internet access

After section 124I of the Communications Act 2003 insert—

"124J

Contents of code about obligations to limit internet access

(1)

The criteria referred to in section 124I(4) are—

- (a) that the requirements concerning enforcement and related matters are met in relation to the code (see subsections (2) and (3));
- (b) that the requirements concerning subscriber appeals are met in relation to the code (see section 124K);
- (c) that it makes any provision about contributions towards meeting costs that is required to be included by an order under section 124M;
- (d) that it makes any other provision that the Secretary of State requires it to make;
- (e) that the provisions of the code are objectively justifiable in relation to the matters to which it relates;
- (f) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
- (g) that those provisions are proportionate to what they are intended to achieve; and
- (h) that, in relation to what those provisions are intended to achieve, they are transparent.

(2)

The requirements concerning enforcement and related matters are—

- (a) that OFCOM have, under the code, the functions of administering and enforcing it, including the function of resolving owner-provider disputes;
- (b) that there are adequate arrangements under the code for OFCOM to obtain any information or assistance from internet service providers or copyright owners that OFCOM reasonably require for the purposes of administering and enforcing the code; and
- (c) that there are adequate arrangements under the code for the costs incurred by OFCOM in administering and enforcing the code to be met by internet service providers and copyright owners.

(3)

The provision made concerning enforcement and related matters may also (unless the Secretary of State requires otherwise) include, in particular—

- (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 124L(2);
- (b) provision requiring a copyright owner to indemnify an internet service provider for any loss or damage resulting from the owner's infringement or error in relation to the code or the copyright infringement provisions.

(4)

In this section “owner-provider dispute” means a dispute that—

is between persons who are copyright owners or internet service providers; and (a)
relates to an act or omission in relation to a technical obligation or a technical obligations (b)
code."



13

Subscriber appeals

After section 124J of the Communications Act 2003 insert—

"124K

Subscriber appeals

The requirements concerning subscriber appeals are—

for the purposes of section 124E(1)(h), the requirements of subsections (2) to (8); and

for the purposes of section 124J(1)(b), the requirements of subsections (2) to (11).

The requirements of this subsection are—

that the code confers on subscribers the right to bring a subscriber appeal and, in the case of a technical obligations code, a further right of appeal to the First-tier Tribunal;

that there is a person who, under the code, has the function of determining subscriber appeals;

that that person is for practical purposes independent (so far as determining subscriber appeals is concerned) of internet service providers, copyright owners and OFCOM; and

that there are adequate arrangements under the code for the costs incurred by that person in determining subscriber appeals to be met by internet service providers, copyright owners and the subscriber concerned.

The code must provide for the grounds of appeal (so far as an appeal relates to, or to anything done by reference to, a copyright infringement report) to include the following—

that the apparent infringement to which the report relates was not an infringement of copyright;

that the report does not relate to the subscriber's IP address at the time of the apparent infringement.

The code must provide for the grounds of appeal to include contravention by the copyright owner or internet service provider of the code or of an obligation regulated by the code.

The code must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that, as respects

any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—

(a)

the apparent infringement was an infringement of copyright, and

(b)

the report relates to the subscriber's IP address at the time of that infringement.

(6)

The code must provide that, where a ground mentioned in subsection (3) is relied on, the appeal must be determined in favour of the subscriber if the subscriber shows that—

(a)

the act constituting the apparent infringement to which the report relates was not done by the subscriber, and

(b)

the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.

(7)

The powers of the person determining subscriber appeals must include power—

(a)

to secure so far as practicable that a subscriber is not prejudiced for the purposes of the copyright infringement provisions by an act or omission in respect of which an appeal is determined in favour of the subscriber;

(b)

to make an award of compensation to be paid by a copyright owner or internet service provider to a subscriber affected by such an act or omission; and

(c)

where the appeal is determined in favour of the subscriber, to direct the copyright owner or internet service provider to reimburse the reasonable costs of the subscriber.

(8)

The code must provide that the power to direct the reimbursement of costs under subsection (7)(c) is to be exercised to award reasonable costs to a subscriber whose appeal is successful, unless the person deciding the appeal is satisfied that it would be unjust to give such a direction having regard to all the circumstances including the conduct of the parties before and during the proceedings.

(9)

In the case of a technical obligations code, the powers of the person determining subscriber appeals must include power—

(a)

on an appeal in relation to a technical measure or proposed technical measure—

(i)

to confirm the measure;

(ii)

to require the measure not to be taken or to be withdrawn;

(iii)

to substitute any other technical measure that the internet service provider has power to take;

(b)

to exercise the power mentioned in paragraph (a)(ii) or (iii) where an appeal is not upheld but the person determining it is satisfied that there are exceptional circumstances that justify the exercise of the power;

(c)

to take any steps that OFCOM could take in relation to the act or omission giving rise to the technical measure; and

(d)

to remit the decision whether to confirm the technical measure, or any matter relating to that decision, to OFCOM.

(10)

In the case of a technical obligations code, the code must make provision—

(a)

enabling a determination of a subscriber appeal to be appealed to the First-tier Tribunal, including on grounds that it was based on an error of fact, wrong in law or unreasonable;

(b)

giving the First-tier Tribunal, in relation to an appeal to it, the powers mentioned in subsections (7) and (9); and

(c)

in relation to recovery of costs awarded by the Tribunal.

(11)

In the case of a technical obligations code, the code must include provision to secure that a technical measure is not taken against a subscriber until—

(a)

the period for bringing a subscriber appeal, or any further appeal to the First-tier Tribunal, in relation to the proposed measure has ended (or the subscriber has waived the right to appeal); and

(b)

any such subscriber appeal or further appeal has been determined, abandoned or otherwise disposed of."



14

Enforcement of obligations

After section 124K of the Communications Act 2003 insert—

"124L

Enforcement of obligations

(1)

Sections 94 to 96 apply in relation to a contravention of an initial obligation or a technical obligation, or a contravention of an obligation under section 124G(6), as they apply in relation to a contravention of a condition set out under section 45.

(2)

The amount of the penalty imposed under section 96 as applied by this section is to be such amount not exceeding £250,000 as OFCOM determine to be—

(a)

appropriate; and

(b)

proportionate to the contravention in respect of which it is imposed.

(3)

- In making that determination OFCOM must have regard to—
- (a) any representations made to them by the internet service provider or copyright owner on whom the penalty is imposed;
 - (b) any steps taken by the provider or owner towards complying with the obligations contraventions of which have been notified to the provider or owner under section 94 (as applied); and
 - (c) any steps taken by the provider or owner for remedying the consequences of those contraventions.
- The Secretary of State may by order amend this section so as to substitute a different maximum penalty for the maximum penalty for the time being specified in subsection (2).
- No order is to be made containing provision authorised by subsection (4) unless a draft of the order has been laid before Parliament and approved by a resolution of each House."



15

Sharing of costs

After section 124L of the Communications Act 2003 insert—

"124M

Sharing of costs

- (1) The Secretary of State may by order specify provision that must be included in an initial obligations code or a technical obligations code about payment of contributions towards costs incurred under the copyright infringement provisions.
- (2) Any provision specified under subsection (1) must relate to payment of contributions by one or more of the following only—
 - (a) copyright owners;
 - (b) internet service providers;
 - (c) in relation to a subscriber appeal or a further appeal by a subscriber to the First-tier Tribunal, the subscriber.
- (3) Provision specified under subsection (1) may relate to, in particular—
 - (a) payment by a copyright owner of a contribution towards the costs that an internet service provider incurs;
 - (b) payment by a copyright owner or internet service provider of a contribution towards the costs that OFCOM incur.
- (4) Provision specified under subsection (1) may include, in particular—

- (a) provision about costs incurred before the provision is included in an initial obligations code or a technical obligations code;
 - (b) provision for payment in advance of expected costs (and for reimbursement of overpayments where the costs incurred are less than expected);
 - (c) provision about how costs, expected costs or contributions must be calculated;
 - (d) other provision about when and how contributions must be paid.
- (5) No order is to be made under this section unless a draft of the order has been laid before Parliament and approved by a resolution of each House."



16

Interpretation and consequential provision

(1)

After section 124M of the Communications Act 2003 insert—

"124N

Interpretation

In sections 124A to 124M and this section—

“apparent infringement”, in relation to a copyright infringement report, means the infringement of copyright that the report states appears to have taken place;

“copyright infringement list” has the meaning given in section 124B(2);

“copyright infringement provisions” means sections 124A to 124M and this section;

“copyright infringement report” has the meaning given in section 124A(3);

“copyright owner” means—

(a)

a copyright owner within the meaning of Part 1 of the Copyright, Designs and Patents Act 1988 (see section 173 of that Act); or

(b)

someone authorised by that person to act on the person's behalf;

“copyright work” has the same meaning as in Part 1 of the Copyright, Designs and Patents Act 1988 (see section 1(2) of that Act);

“initial obligations” has the meaning given in section 124C(1);

“initial obligations code” has the meaning given in section 124A(2);

“internet access service” means an electronic communications service that—

(a)

is provided to a subscriber;

(b)

consists entirely or mainly of the provision of access to the internet; and

(c)

includes the allocation of an IP address or IP addresses to the subscriber to enable that access;

“internet service provider” means a person who provides an internet access service;

“IP address” means an internet protocol address;

“subscriber”, in relation to an internet access service, means a person who—

receives the service under an agreement between the person and the provider of the service; and (a)

does not receive it as a communications provider; (b)
“subscriber appeal” means—

in relation to an initial obligations code, an appeal by a subscriber on grounds specified in the code in relation to— (a)

the making of a copyright infringement report; (i)

notification under section 124A(4); (ii)

the inclusion or proposed inclusion of an entry in a copyright infringement list; or (iii)

any other act or omission in relation to an initial obligation or an initial obligations code; (iv)

in relation to a technical obligations code, an appeal by a subscriber on grounds specified in the code in relation to— (b)

the proposed taking of a technical measure; or (i)

any other act or omission in relation to a technical obligation or a technical obligations code; (ii)

“technical measure” has the meaning given in section 124G(3);

“technical obligation” has the meaning given in section 124G(2);

“technical obligations code” means a code in force under section 124I.”

(2)

In section 135(3) of that Act (information required for purposes of Chapter 1 functions), after paragraph (i) insert—

preparing a report under section 124F; (ia)

carrying out an assessment, taking steps or providing a report under section 124G;”. (ib)

(3)

In Schedule 8 to that Act (decisions not subject to appeal to the Competition Appeal Tribunal), after paragraph 9 insert—

“9A

A decision relating to any of sections 124A to 124N or to anything done under them.”

Annotations:

Commencement Information

I1S. 16 wholly in force at 8.6.2010; s. 16(1) in force at Royal Assent and s. 16(2)(3) in force at 8.6.2010 see s. 47(1)(2)(a)



17

Power to make provision about injunctions preventing access to locations on the internet

(1)

The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright.

(2)

“Blocking injunction” means an injunction that requires a service provider to prevent its service being used to gain access to the location.

(3)

The Secretary of State may not make regulations under this section unless satisfied that—

(a)

the use of the internet for activities that infringe copyright is having a serious adverse effect on businesses or consumers,

(b)

making the regulations is a proportionate way to address that effect, and

(c)

making the regulations would not prejudice national security or the prevention or detection of crime.

(4)

The regulations must provide that a court may not grant an injunction unless satisfied that the location is—

(a)

a location from which a substantial amount of material has been, is being or is likely to be obtained in infringement of copyright,

(b)

a location at which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright, or

(c)

a location which has been, is being or is likely to be used to facilitate access to a location within paragraph (a) or (b).

(5)

The regulations must provide that, in determining whether to grant an injunction, the court must take account of—

(a)

any evidence presented of steps taken by the service provider, or by an operator of the location, to prevent infringement of copyright in the qualifying material,

(b)

any evidence presented of steps taken by the copyright owner, or by a licensee of copyright in the qualifying material, to facilitate lawful access to the qualifying material,

(c)

any representations made by a Minister of the Crown,

(d)

whether the injunction would be likely to have a disproportionate effect on any person's legitimate interests, and

(e)

the importance of freedom of expression.

(6)

The regulations must provide that a court may not grant an injunction unless notice of the application for the injunction has been given, in such form and by such means as is specified in the regulations, to—

- (a) the service provider, and
- (b) operators of the location.

(7)

The regulations may, in particular—

- (a) make provision about when a location is, or is not, to be treated as being used to facilitate access to another location,
- (b) provide that notice of an application for an injunction may be given to operators of a location by being published in accordance with the regulations,
- (c) provide that a court may not make an order for costs against the service provider,
- (d) make different provision for different purposes, and
- (e) make incidental, supplementary, consequential, transitional, transitory or saving provision.

(8)

The regulations may—

- (a) modify Chapter 6 of Part 1 of the Copyright, Designs and Patents Act 1988, and
- (b) make consequential provision modifying Acts and subordinate legislation.

(9)

Regulations under this section may not include provision in respect of proceedings before a court in England and Wales without the consent of the Lord Chancellor.

(10)

Regulations under this section must be made by statutory instrument.

(11)

- A statutory instrument containing regulations under this section may not be made unless—
- (a) the Secretary of State has complied with section 18, and
 - (b) a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(12)

In this section—

“copyright owner” has the same meaning as in Part 1 of the Copyright, Designs and Patents Act 1988;

“Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975;

“modify” includes amend, repeal or revoke;

“operator”, in relation to a location on the internet, means a person who has editorial control over material available at the location;

“qualifying material”, in relation to an injunction, means the material taken into account by the court for the purposes of provision made under subsection (4);
“service provider” has the same meaning as in section 97A of the Copyright, Designs and Patents Act 1988;
“subordinate legislation” has the same meaning as in the Interpretation Act 1978.

(13)

In the application of this section to Scotland—

“costs” means expenses;
“injunction” means interdict.



18

Consultation and Parliamentary scrutiny

(1)

Before making regulations under section 17 the Secretary of State must consult—

(a)

the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland,

(b)

the persons that the Secretary of State thinks likely to be affected by the regulations (or persons who represent such persons), and

(c)

such other persons as the Secretary of State thinks fit.

(2)

If, following the consultation under subsection (1), the Secretary of State proposes to make regulations under section 17, the Secretary of State must lay before Parliament a document that—

(a)

explains the proposal and sets it out in the form of draft regulations,

(b)

explains the reasons why the Secretary of State is satisfied in relation to the matters listed in section 17(3)(a) to (c), and

(c)

contains a summary of any representations made during the consultation under subsection (1).

(3)

During the period of 60 days beginning with the day on which the document was laid under subsection (2) (“the 60-day period”), the Secretary of State may not lay before Parliament a draft statutory instrument containing regulations to give effect to the proposal (with or without modifications).

(4)

In preparing draft regulations under section 17 to give effect to the proposal, the Secretary of State must have regard to any of the following that are made with regard to the draft regulations during the 60-day period—

(a)

any representations, and

(b)

any recommendations of a committee of either House of Parliament charged with reporting on the draft regulations.

(5)

When laying before Parliament a draft statutory instrument containing regulations to give effect to the proposal (with or without modifications), the Secretary of State must also lay a document that explains any changes made to the proposal contained in the document laid before Parliament under subsection (2).

(6)

In calculating the 60-day period, no account is to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than 4 days.

6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

Not really.

6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

OFCOM's role is very limited, but the parties do have access to the Courts.

6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services ?

Not yet.

6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

Not yet.

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to "3-strikes" laws?

Not yet.

7. **Private Agreements and UGC**

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of “best practices” regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

No yet to our knowledge, but our enquiries are ongoing.

7.2 How is the filtering to be accomplished?

7.3 Have there been any cases concerning such agreements or “best practices”?

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?

Please send your replies by email to Samantha Holman at sam@icla.ie by **15 January 2011**